No.

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA

v.

GEORGE LABONTE, DAVID E. PIPER,
ALFRED LAWRENCE HUNNEWELL, AND STEPHEN DYER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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Heard Aug. 2, 1995

Decided Dec. 6, 1995

Before: SELYA, CYR and STAHL, Circuit Judges.

SELYA, Circuit Judge.

After many years of study and debate, Congress passed the Sentencing Reform Act of 1984, Pub.L. 98-473, tit. II, § 212(a), 98 Stat. 1837 (1984) (codified as amended at scattered sections of 18 & 28 U.S.C.). The legislation took effect on November 1, 1987, and caused dramatic changes both in the methodology of criminal sentencing and in the outcomes produced. These changes did not go unremarked: sentencing appeals, once rare in federal criminal cases, became commonplace. Predictably, the tidal wave of appeals loosed a flood of judicial opinions distilling the meaning, scope, and application of a seemingly boundless sea of guidelines, policy statements, notes, and commentary. And whenever it appeared that the flood waters might recede, the Sentencing Commission launched a fresh deluge of revisions that required the courts to paddle even faster in a Sisyphean effort to stay afloat.

These four consolidated appeals are emblematic of the difficulties that courts face in dealing with the new sentencing regime. All four appeals implicate Application Note 2 to the Career Offender Guideline, as modified by Amendment 506, United States Sentencing Commission, *Guidelines Manual* § 4B1.1, comment. (n. 2) (Nov. 1994). No appellate court has addressed the validity of Amendment 506, and, in the quartet of criminal cases underlying these appeals, two able district judges reached diametrically opposite conclusions. Although the call is close, we hold that Amendment 506 is a reasonable implementation of the statutory mandate, 28 U.S.C. § 994(h) (1988 & Supp. V 1993), and is therefore valid. Thus, after

answering other case-specific questions raised by the various parties, we affirm the judgments in the *LaBonte* and *Piper* cases; vacate the judgment in the *Hunnewell* case and remand for reconsideration of the appropriateness of resentencing; affirm the judgment in the *Dyer* case in respect to all non-sentence-related matters and vacate the sentence-related aspect of that judgment, remanding for reconsideration.

I. THE AMENDMENT

Congress created the Sentencing Commission in 1984 to design and implement federal sentencing guidelines. Three principal forces propelled the legislation: Congress sought to establish truth in sentencing by eliminating parole, to guarantee uniformity in sentencing for similarly situated defendants, and to ensure that the punishment fit the crime. *See* U.S.S.G. ch. 1, pt. A(3), & 2; *see also United States* v. *Unger*, 915 F.2d 759, 762-63 (1st Cir.1990) (explaining that the primary purposes of the Sentencing Reform Act are to provide certainty, uniformity, and fairness in sentencing), *cert. denied*, 498 U.S. 1104, 111 S.Ct. 1005, 112 L.Ed.2d 1088 (1991). In addition to general guidance, *see, e.g.*, 28 U.S.C. § 991(b), Congress also gave the Commission some specific marching orders.

One such set of marching orders is conveyed by 28 U.S.C. § 994(h), which provides in part:

> The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and [has been convicted of a

violent crime or felony drug offense and has at least two such prior convictions].

The Commission implemented section 994(h) through the Career Offender Guideline. *See* U.S.S.G. § 4B1.1, comment. (backg'd). This guideline sets forth a table of enhanced total offense levels (TOLs)—said to be a function of the "Offense Statutory Maximum"—to be employed in calculating the sentences of so-called "career offenders." See U.S.S.G. § 4B1.1. A defendant is regarded as a career offender if he was at least eighteen years old at the time of the offense of conviction, that offense is a crime of violence or a drug-related felony, and he has two prior convictions for drug felonies or crimes of violence. *See id.*; *see also United States v. Piper*, 35 F.3d 611, 613 n. 1 (1st Cir.1994), cert. denied, — U.S. ——, 115 S.Ct. 1118, 130 L.Ed.2d 1082 (1995).

When the Commission issued the Career Offender Guideline, it coined the phrase "Offense Statutory Maximum," but did not define the phrase beyond saying that "the term 'Offense Statutory Maximum' refers to the maximum term of imprisonment authorized for the offense of conviction." U.S.S.G. § 4B1.1, comment. (n. 2) (Nov. 1987). Since this definition was tautological, it proved unilluminating. Faced with a need to improvise, several courts of appeals concluded that the phrase encompassed not merely the statutory maximum applicable to the offense of conviction *simpliciter*, but also the upgraded statutory maximum that results after available enhancements for prior criminal activity are taken into account. *See United States v. Smith*, 984 F.2d 1084, 1085 (10th Cir.), *cert. denied*, — U.S. ——, 114 S.Ct. 204, 126 L.Ed.2d 161 (1993); *United States v. Garrett*, 959 F.2d 1005, 1009-11 (D.C.Cir.1992); *United States v. Amis*, 926 F.2d 328, 329-30 (3d Cir.1991); *United States v. Sanchez-Lopez*, 879 F.2d 541, 558-60 (9th Cir.1989). This lexicographical choice carried with it important consequences; under the courts' construction, a defendant whose maximum possible term of imprisonment for a crime of violence or drug offense was enhanced from, say, twenty to thirty years on account of prior criminal activity, netted two additional offense levels (increasing his TOL from thirty-two to thirty-four) and found himself in a steeper sentencing range.

In Amendment 506, the Commission first meaningfully defined the phrase "Offense Statutory Maximum." The amendment provides that the phrase, for the purpose of the Career Offender Guideline, "refers to the maximum term of imprisonment authorized for the offense of conviction that is a crime of violence or controlled substance offense, not including any increase in that maximum term under a sentencing enhancement provision that applies because of the defendant's prior criminal record." U.S.S.G. § 4B1.1, comment. (n. 2) (Nov. 1994). The amended note offers the example of a defendant who is subject to a sentencing enhancement under 21 U.S.C. § 841(b)(1)(C), in which case "the 'Offense Statutory Maximum' for the purposes of this guideline is twenty years and not thirty years." Finally, the Commission opted to give Amendment 506 retroactive effect. See U.S.S.G. § 1B1.10(c) (Nov. 1994).

Initially, the Commission attempted to justify the amendment as "avoid[ing] unwarranted double-counting as well as unwarranted disparity associated with variations in the exercise of prosecutorial discretion in seeking enhanced penalties based on

prior convictions." U.S.S.G., App. C, Amend. 506, at 409 (Nov. 1994). In addition, the Commission observed that Congress enacted the array of sentence-enhancing laws after the statutory predicate for the Career Offender Guideline had become law. *See id.* Subsequently, the Commission attempted to explain its newly emergent interpretation of the Career Offender Guideline in terms of a desire to avoid unwarranted disparity and to achieve consistency. *See* Amendment Notice, 60 Fed.Reg. 14,054, 14,055 (1995); *see also United States v. LaBonte*, 885 F.Supp. 19, 23 n. 4 (D.Me.1995). Whatever may be its provenance, it is nose-on-the-face plain that, in many instances, Amendment 506 produces lower TOLs (and, ultimately, shorter sentences) than the unembellished Career Offender Guideline (as interpreted by the courts). Due to this palliative effect, critics view it as inimical to congressional intent.[1]

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[1] As we have said before, "irony is no stranger to the law." *Amanullah v. Nelson*, 811 F.2d 1, 18 (1st Cir.1987). Throughout its history, the Sentencing Commission has been berated for the severity of the sentencing outcomes dictated by the guidelines. *See, e.g., United States v. Jackson*, 30 F.3d 199, 204-06 (1st Cir.1994) (Pettine, J., concurring) (criticizing the guidelines for fostering excessively harsh sentences); Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines and Unacceptable Limits on the Discretion of Sentencers*, 101 Yale L.J. 1681, 1690 (1992) ("The new sentencing guidelines are more complex, inflexible, and severe than those devised by any other jurisdiction."); Charles J. Ogletree, Jr., *Commentary: The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 Harv.L.Rev. 1938, 1939 (1988) (criticizing the "unreasonably long sentences" produced by the guidelines).

II. THE DEFENDANTS

These four defendants all were sentenced in the District of Maine as career offenders prior to the birth of Amendment 506. In each instance, the prosecution filed a notice under 21 U.S.C. § 851(a)(1) signalling its intention to seek enhanced penalties for prior convictions, and the sentencing court arrived at the defendant's "Offense Statutory Maximum" by factoring the statutory enhancement into the mix. The court then set each defendant's TOL and guideline sentencing range (GSR) accordingly. Following the promulgation of the amendment, all four defendants tried to avail themselves of it. We limn their individual circumstances.

A. GEORGE LABONTE.

A grand jury indicted LaBonte for possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1) & (b)(1)(C). After he pleaded guilty, the district court (Hornby, U.S.D.J.) sentenced him under the Career Offender Guideline. Using an enhanced statutory maximum derived from LaBonte's record of prior drug convictions, Judge Hornby set LaBonte's TOL at thirty-four, granted a three-level downward adjustment for acceptance of responsibility, *see* U.S.S.G. § 3E1.1, arrived at a GSR of 188-235 months, and sentenced him to serve 188 months. We affirmed. *See United States v. Labonte*, 19 F.3d 1427, 1994 WL 107868 (1st Cir.1994) (table).

Subsequent to the promulgation of Amendment 506, LaBonte moved for resentencing. Judge Hornby determined that Amendment 506 was valid and decided to apply it. *See LaBonte*, 885 F.Supp. at 24. He granted LaBonte's motion, focused on the unenhanced statutory maximum to calculate a new TOL

(thirty-two), and again deducted three levels for acceptance of responsibility. This recomputation yielded a GSR of 151-188 months, and Judge Hornby lowered LaBonte's sentence to the nadir of the new range. *See id.* The government appeals from this disposition.

B. DAVID E. PIPER.

Piper pleaded guilty to a two-count information charging conspiracy to possess marijuana with intent to distribute and use of a firearm in connection with a drug offense. *See* 21 U.S.C. §§ 841(a)(1) & (b)(1)(B), 846; 18 U.S.C. § 924(c)(1). Utilizing an enhanced statutory maximum, Judge Hornby set Piper's TOL at thirty-seven, subtracted three levels for acceptance of responsibility, arrived at a GSR of 262-327 months, and imposed an incarcerative sentence of 300 months.[2] We affirmed. *See Piper*, 35 F.3d at 613.

Hot on the heels of Amendment 506, Piper moved unsuccessfully for resentencing. Although Judge Hornby assumed the amendment's validity, he exercised his discretion and declined to permit Piper to benefit from it.[3] Piper appeals from this disposition.

C. ALFRED LAWRENCE HUNNEWELL.

A grand jury indicted Hunnewell on six narcotics counts. See 21 U.S.C. § 841(a)(1). He thereafter pleaded guilty to two counts of possessing controlled substances with intent to distribute, and the court (Carter, U.S.D.J.) dismissed the remaining counts.

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[2] Piper received an additional five-year sentence on the firearms count. That impost is not in issue here.

[3] The amendment, if applied, would have lowered Piper's adjusted offense level from thirty-four to thirty-two, and decreased the GSR to 210- 262 months.

Using an enhanced statutory maximum, Judge Carter set Hunnewell's TOL at thirty-four, deducted three levels for acceptance of responsibility, arrived at a GSR of 188-235 months, and sentenced the defendant to serve 188 months. We affirmed. *See United States v. Hunnewell*, 10 F.3d 805, 1993 WL 483252 (1st Cir.1993) (table), *cert. denied*, — U.S. ——, 114 S.Ct. 1616, 128 L.Ed.2d 343 (1994).

After the promulgation of Amendment 506, Hunnewell beseeched the district court to trim his sentence. Judge Carter denied this motion, concluding that the Sentencing Commission lacked the authority to adopt Amendment 506.[4] Hunnewell appeals.

D. STEPHEN DYER.

Dyer pleaded guilty to a charge of conspiring to possess controlled substances with intent to distribute in contravention of 21 U.S.C. §§ 841(a)(1), 846. Consulting the enhanced statutory maximum, Judge Carter set Dyer's TOL at thirty-four, refused an acceptance-of-responsibility discount, arrived at a GSR of 262-327 months, and levied a 262-month term of imprisonment. We affirmed. *See United States v. Dyer*, 9 F.3d 1 (1st Cir.1993) (per curiam).

Dyer eventually filed a petition for habeas relief, see 28 U.S.C. § 2255, in which he sought to set aside his conviction or, in the alternative, to reduce his sentence by virtue of Amendment 506. Judge Carter denied and dismissed the habeas petition. Among other things, the judge, declaring Amendment 506 to

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[4] The amendment, if applied, would have lowered Hunnewell's adjusted offense level from thirty-one to twenty-nine, and decreased his GSR to 151-188 months.

be unlawful, refused to resentence Dyer.[5] Dyer protests all aspects of the district court's order.

III. THE VALIDITY OF AMENDMENT 506

We begin our analysis by discussing, generally, the methodology we will employ in examining Amendment 506. We then proceed to tackle the two conundrums that are inextricably intertwined with the question of the amendment's validity.

A. THE METHODOLOGY.

Commentary authored by the Sentencing Commission that "interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." *Stinson v. United States*, 508 U.S. 36, ——, 113 S.Ct. 1913, 1915, 123 L.Ed.2d 598 (1993). Like the Commission's policy statements, its commentary is binding on the federal courts. *See id.* at —— - ——, 113 S.Ct. at 1917-18. In general, these interpretive materials are entitled to the same substantial degree of deference that courts routinely accord an administrative agency's interpretation of its own legislative rules. *See id.* at ——, 113 S.Ct. at 1919. Thus, under *Stinson*, judicial scrutiny of the Commission's commentary is limited to ensuring consistency with federal statutes (including, but not restricted to, the Commission's enabling statute), and with the guidelines themselves.

These two lines of inquiry proceed along different analytic paths. When a court ventures to determine whether the Commission's commentary tracks the

[5] Amendment 506, if applied, would have lowered Dyer's adjusted offense level from thirty-four to thirty-two, and decreased his GSR to 210-262 months.

guidelines, the degree of deference is at its zenith. In this context, commentary is not merely the end product of delegated authority for rulemaking, but, rather, "explains the guidelines and provides concrete guidance as to how even unambiguous guidelines are to be applied in practice." *Id.* at ——, 113 S.Ct. at 1918. Unless the commentary is a palpably erroneous rendition of a guideline, it merits respect. *See id.* at ——, 113 S.Ct. at 1919; Piper, 35 F.3d at 617.

The determination of whether the guidelines are consistent with positive statutory law touches a more vulnerable spot. That inquiry implicates the traditional process of reviewing agency rules typified by the Supreme Court's watershed opinion in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Thus, while the Court has warned that *Chevron* does not provide an apt analogy for the process of reviewing the relationship between commentary, on the one hand, and guidelines, on the other hand, *see Stinson*, 508 U.S. at ——, 113 S.Ct. at 1918, we believe that *Chevron* deference is the proper criterion for determining whether a guideline (or, for that matter, commentary that suggests how a guideline should be read) contravenes a statute. The *Chevron* two-step approach fits that type of inquiry like a glove.[6] *See Chevron*, 467 U.S. at 842-43, 104 S.Ct. at 2781-82 (describing two-step test).

[6] We note in passing the suggestion by some scholars that *Stinson* implies an extraordinarily deferential standard of review for the entire process of evaluating guideline commentary. On this view, commentary should be honored unless it constitutes a plainly erroneous interpretation either of a guideline or of a statute. *See* 1 Kenneth Culp Davis and Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.10, at

Applying this methodology here is not without complications. We limit our inquiry to the fit (or lack of fit) between the Career Offender Guideline as explicated in Amendment 506 and the applicable statute, 28 U.S.C. § 994(h).[7] In that statute, Congress directed the Commission to ensure that certain recidivists receive sentences "at or near the maximum." The Career Offender Guideline represents the Commission's response to this directive. *See* U.S.S.G. § 4B1.1, comment. (backg'd). Because the Commission's understanding of its statutory mandate must be measured against the *Chevron* benchmark, the inquiry follows a familiar format:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter. . . . If, however, the court determines Congress has not directly addressed the precise question at issue, the . . . question for the court is whether the agency's answer is based on a permissible construction of the statute.

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284 (3d ed. 1994). We need not probe this possibility today. Because Amendment 506 passes muster under the *Chevron* test, it would clearly pass muster if we were to employ the more deferential test suggested by Professors Davis and Pierce.

[7] Because the government does not contend that Amendment 506 is inconsistent with the guideline itself, we eschew any discussion of that point. *See United States v. Zannino*, 895 F.2d 1, 17 (1st Cir.) (explaining that issues not briefed and argued are deemed abandoned), *cert. denied*, 494 U.S. 1082, 110 S.Ct. 1814, 108 L.Ed.2d 944 (1990).

Chevron, 467 U.S. at 842-43, 104 S.Ct. at 2781-82; *accord Strickland v. Commissioner, Me. Dep't of Human Servs.*, 48 F.3d 12, 16 (1st Cir.), *cert. denied*, — U.S. ——, 116 S.Ct. 145, 133 L.Ed.2d 91 (1995).

These appeals focus on a single sentence that appears in 28 U.S.C. § 994(h), a sentence that requires the Commission to adopt guidelines "that specify a sentence to a term of imprisonment at or near the maximum term authorized for [certain] categories of defendants." This problematic sentence presents three issues of statutory interpretation, necessitating two distinct iterations of the *Chevron* standard. The first application combines two issues; it concerns the explication of the word "maximum" as that word is used in section 994(h) and, concomitantly, the meaning of the word "categories" as used therein. The second occasion for *Chevron* analysis involves an exegesis of the phrase "at or near" as used in the same sentence. The two problems are interrelated, but they are somewhat different in nature.[8]

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[8] Although we are mindful that plausible if strained interpretations of a series of individual statutory terms might at times lead to an impermissible overall interpretation of a statute, that is not the case here. Whether one conducts the ensuing analysis in one segment or two, the result is unaffected; the simple fact of the matter is that the Commission has developed a reasonable interpretation of the vague and ambiguous language of section 994(h). That said, we employ a piecemeal approach here, as we believe it better illustrates that U.S.S.G. § 4B1.1, as interpreted by the amended commentary, is a permissible construction of Congress's directive that career offenders be sentenced "at or near the maximum term authorized."

B. THE FIRST CONUNDRUM.

In the context of section 994(h), the term "maximum" is susceptible of divergent meanings, depending, in part, on precisely what constitutes a "categor[y] of defendants." One possible reading is that "categories" are composed of those defendants charged with violations of similar statutes against whom prosecutors have filed notices of intention to seek sentence enhancements (e.g., all repeat offender drug traffickers against whom the government has filed sentence-enhancing informations under 21 U.S.C. § 851(a)(1)). On this view, the relevant statutory maximum for any such defendant would be the enhanced statutory maximum (ESM) applicable to repeat offenders. *See* 21 U.S.C. §§ 841(b)(1), 851(a)(1). But this reading is not linguistically compelled. The word "categories" plausibly can be defined more broadly to include all offenders (or all repeat offenders) charged with transgressing the same criminal statute, regardless of whether the prosecution chooses to invoke the sentence-enhancing mechanism against a particular defendant (e.g., all drug traffickers, or all repeat offender drug traffickers, who are charged with violating 21 U.S.C. § 841(a)(1)). On this view, the word "maximum" refers to the unenhanced statutory maximum (USM), see 21 U.S.C. § 841(b)(1), since this represents the highest possible sentence applicable to all defendants in the category.[9]

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[9] The relevance of this somewhat arid discussion will become more apparent in Part III(C), infra, when the need arises to determine the extent to which sentences are "at or near the maximum."

Since the sentencing guidelines must comport with such specific statutory directives as Congress has ordained, *see United States v. Saccoccia*, 58 F.3d 754, 786 (1st Cir.1995) ("It is apodictic that the sentencing guidelines cannot sweep more broadly than Congress' grant of power to the Sentencing Commission permits."), the question becomes whether Congress clearly intended to prefer one of these interpretations over the other. The issue is not free from doubt. Several courts of appeals have heretofore read the word "maximum" in the former fashion (as referring to the ESM), *see supra* pp. 1400-01 [4a-5a], whereas the Sentencing Commission now reads the word in the latter sense (as referring to the USM). We proceed to test this conflict in the *Chevron* crucible.

1. Step One: Congressional Intent. At the outset, we must determine whether Congress has spoken with sufficient clarity to foreclose alternative interpretations. Statutory construction always starts—and sometimes ends— with the statute's text. Here, we find Congress's handiwork opaque. The problem is not ambiguity in definition. Rather, it is simply unclear from the bare language of the law which maxima and what categories Congress had in mind when it contrived section 994(h).

The earlier cases relating the word "maximum" to the ESM do not dictate a contrary conclusion. Those courts envisaged their primary task as interpreting the meaning of the guidelines, *see, e.g., Garrett*, 959 F.2d at 1010 (concluding that "the Guidelines require us to define the [term] Offense Statutory Maximum" in a particular way); *Amis*, 926 F.2d at 329 (stating the court's task as "merely [to] determine the 'Offense Statutory Maximum' as used in guidelines § 4B1.1"), and they did so without the aid of Amendment

506. Although two courts suggested that reading "Offense Statutory Maximum" as referring to the ESM would better effectuate congressional intent, *see Garrett*, 959 F.2d at 1010; *Sanchez-Lopez*, 879 F.2d at 559, neither of these courts held—or even hinted—that section 994(h) thwarted a different reading. We have found no indication that any of the courts which scrutinized the unexplicated version of U.S.S.G. § 4B1.1 detected the kind of clear, overarching congressional directive that would suffice to abort a *Chevron* inquiry.

Even were we to believe otherwise, two abecedarian principles of statutory construction nonetheless would counsel continuation of the *Chevron* journey. First, courts that read a statute without the aid of an authoritative interpretation by the agency charged with administering the statute must reexamine their reading if the agency later speaks to the point. *See International Ass'n of Bridge, Structural, and Ornamental Ironworkers, Etc. v. NLRB*, 946 F.2d 1264, 1271 (7th Cir.1991). Second, an agency that is charged with administering a statute remains free to supplant prior judicial interpretations of that statute as long as the agency interpretation is a reasonable rendition of the statutory text. *See id.* at 1270; *see also Rust v. Sullivan*, 500 U.S. 173, 186-87, 111 S.Ct. 1759, 1768-69, 114 L.Ed.2d 233 (1991) (holding that an agency is free to reverse its own previous interpretation of a statute, subject to the same condition); *Strickland*, 48 F.3d at 18 (same). Hence, we trek onward.

When the plain meaning of a law is not readily apparent on its face, the next resort is to the traditional tools of statutory construction—reviewing legislative history and scrutinizing statutory struc-

ture and design—in an effort to shed light on Congress's intent.[10]

As originally envisioned, section 994(h) would have placed the onus of imposing sentences "at or near the maximum" directly on sentencing judges. *See* S.Rep. No. 98-225, 98th Cong., 2d Sess. 175 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3358. The provision's author, Senator Kennedy, devised it as a means of putting "[c]areer criminals . . . on notice that their chronic violence will be punished by maximum prison sentences." 128 Cong.Rec. 26,518 (1982). But that proposal did not take wing; the Senate Judiciary Committee instead approved section 994(h) in its current incarnation. This version, unlike the rejected proposal, addresses its command to the Commission, not the courts. The Committee obviously believed that this change would better "assure consistent and rational implementation of the Committee's view that substantial prison terms should be imposed on repeat violent offenders and repeat drug offenders." S.Rep. No. 98-225, *supra*, 1984 U.S.C.C.A.N. at 3358. We think that this history confirms

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[10] We acknowledge the ongoing debate over the propriety, under *Chevron*, of going beyond plain meaning analysis and resorting to the traditional tools of statutory construction in search of a clear congressional directive. *Compare INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-48, 107 S.Ct. 1207, 1221-22, 94 L.Ed.2d 434 (1987) (suggesting that, under the first prong of *Chevron*, courts should employ "traditional tools of statutory construction") with id. at 454, 107 S.Ct. at 1225 (Scalia, J., concurring) (rejecting this statement). This court has followed *Chevron*, 467 U.S. at 843, 104 S.Ct. at 2781-82 n. 9, and employed the full tool chest of statutory construction implements in attempting to detect clear congressional meaning. *See, e.g., Strickland*, 48 F.3d at 19. We continue that practice in this case.

that (1) in creating the Commission, Congress had an overall goal of curtailing judicial discretion in sentencing matters; and (2) in enacting section 994(h), Congress had a specific intent to let the Commission (as opposed to individual judges) determine the best method for assuring that career offenders would receive stiff prison sentences. Past this point, the legislative archives offer no clue as to whether Congress ever recognized either the potential ambiguity of the term "maximum" or the uncertainty that might attach to the question of what constitutes a category of offenders.

Finding the relevant legislative history to be no clearer than the statute's text, we look to the enabling legislation and the overall structure of the Sentencing Reform Act for what insights they may afford. Superficially, these considerations seem to support the government's position that the "maximum" is the ESM. Reading "categories" narrowly enough to distinguish between offenders on the basis of whether the United States Attorney has filed sentence-enhancing informations yields potentially harsher sentences in those cases, thereby promising more stringent punishment for selected repeat offenders. That narrow reading also preserves the distinction between offenders who are subject to sentence enhancements based on prior criminal activity and those who are not—a distinction that Congress arguably delivered into the hands of prosecutors. *See, e.g.*, 21 U.S.C. §§ 841(b)(1), 851(a)(1).

Although these asseverations put the government's best foot forward, they are at most debating points in relation to the problem at hand. They neither indicate that Congress has spoken directly to the precise issue nor reflect a sufficiently clear congressional

intent to circumscribe the Commission's interpretive powers. Indeed, the arguments are circular; the touted advantages of the government's reading appear to be advantageous only if one assumes the conclusion that the government is struggling to prove.

We will not add hues to a rainbow. Because we find no clear congressional directive regarding the meaning of the term "maximum" as that term is used in section 994(h), our inquiry proceeds to the second half of the *Chevron* two- step.

2. Step Two: Plausibility of the Commission's Interpretation. Where, as here, a statute is not clear, an interpretation by the agency that administers it will prevail as long as the interpretation is reasonable under the statute. *See Strickland*, 48 F.3d at 21. We believe that the Commission's act in defining "maximum" to refer to the unenhanced maximum term of imprisonment—the USM—furnishes a reasonable interpretation of section 994(h). The statute explicitly refers to "categories of defendants," namely, repeat violent criminals and repeat drug offenders, and does not suggest that each individual offender must receive the highest sentence available against him. The Career Offender Guideline, read through the prism of Amendment 506, adopts an entirely plausible version of the categorical approach that the statute suggests. Unless one is prepared to write off Congress's choice of the word "categories" as some sort of linguistic accident or awkward locution—and we are not so inclined—this approach is eminently supportable.

Our dissenting colleague decries the Commission's categorical approach. He states that, indeed, "the phrase 'categories of defendants' is perhaps better understood . . . as a 'linguistic accident or an awkward

locution.'" *Post* at 1416. To the contrary, this conclusion is foreclosed by, inter alia, the following explicit language in 18 U.S.C. § 3553:

> (a) . . . The court, in determining the particular sentence to be imposed, shall consider—
>
> . . . .
>
> (4) the kinds of sentence and the sentencing range established for—
>
> (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28 . . . . (Emphasis supplied).

Further inescapable evidence that the term "categories of defendants" is neither an accidental nor a recent congressional usage, see post at 1416-17 [44a], appears in 28 U.S.C. § 994(b)(1):

> *The Commission*, in the guidelines promulgated pursuant to *subsection (a)(1), shall, for each category of offense involving each category of defendant, establish a sentencing range* that is *consistent with all pertinent provisions of title 18*, United States Code. (Emphasis supplied).

Thus, rather than a recent slip of the legislative pen, the term "categories of defendants," as used in section 994(h), originated in the carefully incubated legislation mandating a guideline sentencing system that was to be promulgated and monitored by the Sentencing Commission, *see* 28 U.S.C. § 994, and implemented by the courts, *see* 18 U.S.C. § 3553. Among the more important innovations attending the

establishment of the new guideline sentencing system were certain restrictions on judicial consideration and weighting of individualized sentencing factors, *see, e.g.*, 18 U.S.C. § 3553(a)(4), (b), (c); hence, the possibly "awkward," but nonetheless plainly intended, usage "categories of defendants."

Given the identical statutory phrasing consistently employed by Congress in titles 18 and 28, as well as their coordinate design, we are unable to endorse the unsupported statutory interpretation advanced in dissent. Rather, we must follow the canons of statutory interpretation which demand that a court give meaning to each word and phrase when explicating a statute, and read the component parts of a legislative enactment as a unified whole. *See United Technologies Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 101 (1st Cir.1994), *cert. denied*, — U.S. ——, 115 S.Ct. 1176, 130 L.Ed.2d 1128 (1995); *United States v. Ven-Fuel, Inc.*, 758 F.2d 741, 751-52 (1st Cir.1985); *see also Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818, 827 (1st Cir.1992) ("It is . . . a general rule that when Congress borrows language from one statute and incorporates it into a second statute, the language of the two acts should be interpreted the same way."), *cert. denied*, 506 U.S. 1052, 113 S.Ct. 974, 122 L.Ed.2d 129 (1993).

Moreover, the Sentencing Reform Act places many restraints on the Commission apart from those embodied in section 994(h). The most salient of these restraints is the requirement of sentencing consistency. *See* 28 U.S.C. § 994(f). The Commission adverted to this concern in promulgating Amendment 506, *see* U.S.S.G., App. C, Amend. 506, at 409 (Nov. 1994), and responded to it by taking a categorical approach. Similarly, Congress's efforts to eliminate

sentencing disparities can be reconciled with section 994(h)'s exhortation for maximal sentencing only if one hears that exhortation as being addressed to categories of defendants. In the final analysis, the Commission remains fully faithful to the welter of congressional commands by choosing to treat repeat offenders as broad categories of defendants and thereby harmonizing the call for stringent punishment of recidivists with the call for consistent, non-disparate sentences.

The government lodges two further objections to the plausibility of the Commission's rationale. First, it contends that Congress, by means of such statutes as 21 U.S.C. § 851(a)(1), intended to give prosecutors commodious discretion over the potential sentences of repeat offenders, and that Amendment 506 frustrates this intent. Though the government may well be correct in asserting that Congress did not create the Sentencing Commission with an eye toward eradicating prosecutorial abuses, it does not follow that Congress strove affirmatively to give prosecutors the keys to the kingdom.[11] What is more, it makes very little sense to impute to Congress a yearning for unbridled prosecutorial discretion when two major goals of sentencing reform were to "assure that

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[11] The government makes much of the fact that the Senate Judiciary Committee, in creating the Commission, disclaimed any fear that the guidelines would increase prosecutors' discretion to reduce sentences through plea bargains. *See* S.Rep. No. 98-225, *supra*, 1984 U.S.C.C.A.N. at 3246. But Congress's explanation (which stressed that the Commission could guard against this phenomenon because it was empowered to issue policy statements concerning the review of plea bargains, *see id.*), is indicative of the latitude it intended to give *to the Commission*.

sentences are fair both to the offender and to society," S.Rep. No. 98-225, *supra*, 1984 U.S.C.C.A.N. at 3222, and to "avoid [ ] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct." 28 U.S.C. § 991(b)(1)(B).

The government's remaining objection to the Commission's reading of the word "maximum" is that this reading prescribes an identical sentencing range for repeat offenders whether or not the prosecution has sought to obtain sentence enhancements. This reading, the government says, effectively eliminates prosecutorial enhancements and arrogates unto the Commission the authority that Congress explicitly vested in the United States Attorney. We find this polemic unpersuasive.

We take 21 U.S.C. § 841(b)(1) as our point of departure. This section establishes unenhanced maximum terms applicable to all violators, enhanced maximum terms applicable to certain repeat offenders, and, in some cases, mandatory minimum terms of incarceration (enhanced or unenhanced). It is elementary that any guideline which prescribes a sentence that falls within these parameters does not conflict with the statute. What remains is a policy choice, and the Commission, by opting to emphasize the USM, has done no more than exercise its prerogative to make precisely this kind of policy choice. *See Chevron*, 467 U.S. at 864, 104 S.Ct. at 2792.

Furthermore, the choice is not unreasonable. The root purpose of the Career Offender Guideline, U.S.S.G. § 4B1.1, is to enhance repeat offenders' sentences. The revamped guideline not only accomplishes that purpose but also coheres with

Congress's discernible aims in making enhanced penalties available under section 841. While that statute establishes a *possible* enhanced penalty for repeat offenders if prosecutors choose, the Career Offender Guideline, as filtered through Amendment 506, ensures an *actual* enhancement of the TOL for all repeat offenders. This critical distinction belies the government's lament that the amendment sounds a death knell for enhancements required by statute. The guideline, section 4B1.1, as explicated by Amendment 506, departs from the statute, section 841, only in the sense that the former seeks to enhance the sentences of a wider class of recidivists. This departure lacks significance. For purposes of testing the fidelity of the sentencing guidelines' career offender provisions to the statutory scheme, it is irrelevant that some sentences beyond those mandated by Congress are also enhanced.

When all is said and done, the Commission's decision to treat the word "maximum" as meaning the unenhanced statutory maximum applicable to a category of offenders, broadly defined, is a plausible rendition of section 994(h). We must honor the Commission's definition.

C. THE SECOND CONUNDRUM.

As we have previously explained, section 994(h) contains a specific directive that, in the case of career offenders, sentences ought to be "at or near the maximum term authorized." The government contends that, regardless of how the word "maximum" is construed, Amendment 506 is invalid because it fails to produce sentences that are "at or near" any conceivable maximum. As before, we measure this contention by wielding the *Chevron* yardstick.

1. Step One: Congressional Intent. At the risk of belaboring the obvious, we start from the premise that "at or near" is neither an exact nor a self-defining term. Section 994(h) is silent as to how "near" sentences must be to the maximum, and the legislative history is singularly unhelpful on this point. Especially since we must concentrate on the USM in calculating how "near" the Commission's sentencing ranges are to the statutory goal, see *supra* Part III(B), we are unable to divine a sufficiently clear expression of congressional intent. Thus, we quickly move to the second—and decisive—portion of the Chevron query.

2. Step Two: Plausibility of the Commission's Interpretation. The question of plausibility reduces to whether the Career Offender Guideline, as now interpreted by the Commission, sufficiently ensures sentences that satisfy a reasonable construction of "at or near the maximum." In this setting, deference to the Commission is especially appropriate. "At or near" is an inherently variable phrase. In speaking with a Texan, one might say that Providence is "near" Boston, but it is doubtful if that description would (or could) be employed in speaking with a resident of, say, Cambridge or Cranston. In all events, the phrase "at or near," as employed in this statute, suggests a continuum of various sentences, each relatively further from, or closer to, the statutory maximum.

It is also important to recognize that the career offender enhancement is not the end point of the sentencing road and, by itself, does not dictate individual defendants' sentences. Once the "Offense Statutory Maximum" derived from the Career Offender Guideline functions to yield a defendant's

TOL, the sentencing court must then make a myriad of individualized adjustments to the offense level, up or down, for factors such as acceptance of responsibility *see* U.S.S.G. § 3E1.1, role in the offense, *see* U.S.S.G. §§ 3B1.1, 3B1.2, and the like. It is only when all the component parts of the sentencing equation are pulled together that the court can ascertain the range of permissible sentences and, hence, settle upon the actual sentence. Even then, the court retains authority, at least in certain circumstances, to depart downward if a particular defendant furnishes substantial assistance in the investigation or prosecution of another person who has committed an offense, *see* 18 U.S.C. § 3553(e); U.S.S.G. s 5K1.1, or to depart in either direction if aggravating or mitigating circumstances warrant, *see* 18 U.S.C. § 3553(b); U.S.S.G. § 5K2.0. Many of these prospective adjustments derive from explicit statutory commands. *See, e.g.*, 28 U.S.C. § 994(n) (directing the Commission to create a mechanism through which defendants will be rewarded for rendering substantial assistance).

We believe that this reality has significant implications for the question at bar. First and foremost, given the labyrinthine way in which repeat offenders' actual sentences are constructed, heightened deference to the Commission's slant on the "at or near" language is very desirable. After all, respect for agency interpretations is "particularly appropriate in complex and highly specialized areas where the regulatory net has been intricately woven," *Com. of Massachusetts, Dep't of Educ. v. United States Dep't of Educ.*, 837 F.2d 536, 541 (1st Cir.1988) (citation and quotation marks omitted), and the sentencing guidelines constitute a classic example of such a web. In other words, due to the interstitial nature of the

career offender calculation, a reviewing court should be generous in assessing the reasonableness of the Commission's approximation of how "near" is "near."

The fact that the career offender adjustment does not itself directly determine any particular defendant's actual sentence has other implications as well. Unless one is ready to place any and all downward adjustments beyond a repeat offender's reach—and even the government does not espouse so extreme a position—it is surpassingly difficult (if not impossible) to expect the Commission to write a rule which ensures that career offenders will invariably receive sentences "at or near" each individual's ESM. Once a sentencing court has made such downward adjustments, it would be surprising if many defendants' sentences came very near to the statutorily prescribed "maximum" penalties that are theoretically available (however the word "maximum" may be defined). By like token, the very real possibility that upward adjustments to the TOL may make career offenders' sentences more severe suggests that room should be left for play in the joints as the Commission implements the "at or near" language.

Mindful, as we are, of these complexities, we think that Amendment 506 passes muster. The sentences available under the newly explicated Career Offender Guideline constitute a substantial proportion of the possible sentences permitted by statute. We can conveniently illustrate the point by reference to the four defendants who are involved in these appeals. By operation of Amendment 506, defendants like LaBonte, Hunnewell, and Dyer now face maximum sentences of 262 months (the top of the recalculated GSR) before taking into account any individualized adjustments. A 262-month sentence represents

109.2% of the USM for these defendants' offense of conviction.[12] On the same basis, a defendant like Piper now faces a maximum sentence of 365 months (76% of the applicable USM). Examining the gamut of possible sentences available against each defendant under Amendment 506, the median sentence in the range applicable to LaBonte, Hunnewell, and Dyer (236 months) constitutes 98.3% of the USM, while the median sentence in the range pertinent to Piper (294.5 months) constitutes 61.4% of the USM. Under any suitable definition of the word "near," we believe that the Commission could reasonably conclude that these percentages ensure sentences sufficiently close to the USM—and sufficiently harsh—to provide a fair approximation of Congress's desire to see that career offenders, as a group, receive maximal terms of imprisonment.

IV. THE APPLICATION OF AMENDMENT 506

Having determined that Amendment 506 is a lawful exercise of the Sentencing Commission's powers, we now address the motions for resentencing.

The principles governing motions to resentence based on newly emergent guideline amendments can be compactly catalogued. When the Commission amends the guidelines (or its interpretation of the guidelines) in a manner that favors defendants, it may invite retrospective application of the new inter-

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[12] We think that this calculation graphically illustrates the fallacy underlying our dissenting brother's lament that Amendment 506, "effectively nullifies the criminal history enhancements carefully enacted in statutes like 21 U.S.C. § 841." *See post* at 1415.

pretation.[13] In such an event, a defendant who believes that the amendment, if in force earlier, would have reduced his GSR may move for resentencing. The district court, "after considering the factors set forth in section 3553(a) to the extent that they are applicable," may reduce the sentence "if such a reduction is consistent with the applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(2).[14] The law permits, but does not require, the district court to resentence such a defendant. *See United States v. Connell*, 960 F.2d 191, 197 (1st Cir.1992). Because this decision is committed to the trial court's discretion, the court of appeals will interfere only if the record reveals a palpable abuse of that discretion. *See United States v. Pardue*, 36 F.3d 429, 430 (5th Cir.1994), *cert. denied*, — U.S. ——, 115 S.Ct. 1969, 131 L.Ed.2d 858 (1995); *United States v. Telman*, 28 F.3d 94, 96-97 (10th Cir.1994); *see also*

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[13] For this purpose, an "amendment" differs from a "clarification." Clarifications explain earlier editions of the sentencing guidelines; they do not change those provisions. Because they are retrospective by nature, they do not require any special retroactivity designation. *See* U.S.S.G. § 1B1.11(b)(2); *see also United States v. LaCroix*, 28 F.3d 223, 227 n. 4 (1st Cir.1994). In contrast, amendments do change prior guidelines and, if they are to be given retroactive effect, the Commission must so specify. *See* 28 U.S.C. § 994(u); U.S.S.G. § 1B1.10. This opinion deals exclusively with amendments as opposed to clarifications.

[14] The factors set forth in section 3553(a), insofar as they are arguably applicable to any of the instant defendants, include the nature and circumstances of the offense, the defendant's criminal past, the GSRs, the Commission's policy statements, and the necessity of avoiding unwarranted sentencing disparities among similarly situated defendants. *See* 18 U.S.C. § 3553(a).

United States v. Twomey, 845 F.2d 1132, 1134 (1st Cir.1988). It is plain that, under this paradigm, most resentencing battles will be won or lost in the district court, not in an appellate venue.

With this brief preface, we reach the individual defendants' cases.

A. GEORGE LABONTE.

In LaBonte's case, the district court upheld Amendment 506 and applied it to reduce the defendant's sentence. *See LaBonte*, 885 F.Supp. at 24. Although the government appeals from the reconfigured sentence, it challenges only the lower court's validation of the reinterpreted Career Offender Guideline. Because the government has neither asserted nor argued a claim that the court abused its considerable discretion in reducing LaBonte's sentence, we must affirm the judgment. *See United States v. Zannino*, 895 F.2d 1, 17 (1st Cir.), *cert. denied*, 494 U.S. 1082, 110 S.Ct. 1814, 108 L.Ed.2d 944 (1990).

B. DAVID E. PIPER.

In Piper's case, the district court upheld Amendment 506 but refused to mitigate the original sentence. Piper proffers a potpourri of protests to the court's ruling. Only two of them warrant discussion.

First, Piper suggests that under 18 U.S.C. § 3582(c)(2) a district court may only decide whether the policies underlying an amendment would be served by a lessened sentence. Piper misreads the statute: it authorizes the district judge to resentence when resentencing is consistent with the policies underlying the amendment, but it neither compels the judge to do so nor limits his inquiry to the consistency question. Since the language is precatory

rather than mandatory, the district court need not even consider the policy statements supporting an amendment if, "after considering the factors set forth in § 3553(a) to the extent they are applicable," 18 U.S.C. § 3582(c)(2), the court prefers to stand by the existing sentence.

Piper's next remonstrance suggests that the district court failed to reweigh the factors delineated in section 3553(a), *see supra* note 14, and that, therefore, the court's decision cannot constitute a proper exercise of judicial discretion. The problem with this remonstrance lies in its premise. The district judge presided over Piper's case from the outset. He possessed great familiarity with the odious nature of the offense of conviction (leading a "commando-style" raid on a family's home while heavily armed, and searching for a stash of illegal drugs supposedly secreted there). Having sentenced Piper originally, he knew the intimate details of Piper's criminal history. At the hearing on the motion to resentence, the judge listened to arguments that zeroed in on the very factors that Piper now claims were overlooked.

In the end, Piper's argument invites us to elevate form over substance. We decline the invitation. Where, as here, it is clear that the sentencing judge has considered the section 3553(a) factors, we will not interpose a further requirement that he make explicit findings as to each and all of those factors. *See United States v. Savoie*, 985 F.2d 612, 618 (1st Cir.1993) (holding that a district court need not make explicit findings regarding the statutory factors relevant to restitution orders "so long as the record on appeal reveals that the judge made implicit findings or otherwise adequately evinced his con-

sideration of those factors"); *United States v. Wilfred Am. Educ. Corp.*, 953 F.2d 717, 720 (1st Cir.1992) (similar, in respect to fines); *see generally United States v. Tavano*, 12 F.3d 301, 307 (1st Cir.1993) ("As a general rule, a trial court lawfully may make implicit findings with regard to sentencing matters. . . ."). On this record, it strains credulity to suggest that the district court neglected to take account of statutorily required items in its decisionmaking process.

C. ALFRED LAWRENCE HUNNEWELL.

In Hunnewell's case, the district court held that Amendment 506 was invalid, and refused to apply it *for that reason*. Having concluded that the lower court erred, *see supra* Part III, we ordinarily would remand for further proceedings. But the government has other ideas; it asserts that the district court's order should be construed as an exercise of discretion, and it asks us to affirm the denial of Hunnewell's resentencing request on this basis.

After a painstaking examination of the record, we reject the government's asseveration. Calling a horse a cow does not yield milk. Indeed, the government tacitly concedes the weakness of its position by forgoing developed argumentation on this point and instead regaling us with the reasons why the district could (or should) have declined to extend an olive branch to Hunnewell. The fact remains, however, that the discretion conferred by 18 U.S.C. § 3582(c)(2) is for the district court—not this court—to exercise in the first instance. Consequently, the denial of Hunnewell's motion for resentencing must be set aside and the cause remanded for further consideration of that motion.

Before leaving Hunnewell's situation, we pause to comment on the government's suggestion that, because Hunnewell's original sentence was still within the post-amendment GSR (albeit barely), we need not afford the district court an opportunity to decide whether to resentence him.[15]

In its haste to validate this argument, the government distorts our holding in *United States v. Ortiz*, 966 F.2d 707 (1st Cir.1992), *cert. denied*, — U.S. ——, 113 S.Ct. 1005, 122 L.Ed.2d 154 (1993). In *Ortiz*, we explained that,

> where it appears reasonably likely that the district judge selected a sentence because it was at or near a polar extreme (whether top or bottom) of the guideline range that the judge thought applicable, the court of appeals should vacate the sentence and remand for resentencing if it is determined that the court erred in its computation of the range, notwithstanding that there may be an overlap between the "right" and "wrong" sentencing ranges sufficient to encompass the sentence actually imposed.

Id. at 717-18. So it is here. In Hunnewell's initial sentencing hearing, both the government and the defense asked the court to impose a sentence at the bottom of the GSR. The court obliged. Giving vitality to the foundational principle on which *Ortiz* rests, we cannot be confident that, faced with a different range of options, the district court's choice will remain the same.

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[15] The district court initially computed a GSR of 188-235 months, and sentenced Hunnewell to serve 188 months in prison. Applying Amendment 506 to Hunnewell's case yields a revised GSR of 151-188 months. *See supra* note 4.

D. STEPHEN DYER.

Since Dyer's and Hunnewell's cases are virtually on all fours vis-a-vis the posture of the resentencing issue, we need not linger. For the reasons already expressed, *see supra* Part IV(C), Dyer is entitled to have the district court address the merits of his request for resentencing.

V. THE SECTION 2255 PETITION

Dyer also appeals from the district court's summary dismissal of his section 2255 petition. A district court may dismiss a section 2255 petition without holding an evidentiary hearing if it plainly appears on the face of the pleadings that the petitioner is not entitled to the requested relief, or if the allegations, although adequate on their face, consist of no more than conclusory prognostications and perfervid rhetoric, or if the key factual averments on which the petition depends are either inherently improbable or contradicted by established facts of record. *See United States v. McGill*, 11 F.3d 223, 225 (1st Cir.1993); *see also* 28 U.S.C. § 2255 (explaining that a hearing is unnecessary when the record "conclusively shows that the prisoner is entitled to no relief").

We believe that Dyer's petition is both generally and specifically defective. Taking first things first, the district court noted that Dyer had not presented his factual allegations under oath, and that, therefore, he was not entitled to the relief that he sought. We agree.

Dyer's sworn petition contained nothing more than the bare statement that he received ineffective assistance of counsel. While some additional allegations were set forth in Dyer's memorandum of law, those allegations did not fill the void. A habeas application must rest on a foundation of factual allegations presented under oath, either in a verified petition or supporting affidavits. *See, e.g.*, Rule 2, Rules Governing Section 2255 Proceedings, 28 U.S.C. § 2255. Facts alluded to in an unsworn memorandum will not suffice. *See Barrett v. United States*, 965 F.2d 1184, 1195 (1st Cir.1992); *Dalli v. United States*, 491 F.2d 758, 760 (2d Cir.1974).

Even were we prepared to overlook this fatal shortcoming, the petitioner would not find surcease. We review claims of constitutionally deficient performance on counsel's part under the familiar test of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). According to this regime, a criminal defendant who alleges ineffective assistance must demonstrate that his attorney's performance was unreasonably deficient, and that he was prejudiced as a result of it. *See Scarpa v. Dubois*, 38 F.3d 1, 8 (1st Cir.1994), *cert. denied*, — U.S. ——, 115 S.Ct. 940, 130 L.Ed.2d 885 (1995). When, as in this case, a defendant has pleaded guilty to a charge, the prejudice prong of the test requires him to show that, but for his counsel's unprofessional errors, he probably would have insisted on his right to trial. *See Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 370-71, 88 L.Ed.2d 203 (1985).

In light of these authorities, we think that the district court appropriately dismissed Dyer's habeas petition. In his brief, Dyer contends, *inter alia*, that his trial attorney assured him that his sentence

would be no more than eighteen months, and that there was simply "no way" that he would be sentenced as a career offender pursuant to U.S.S.G. § 4B1.1. Even a generous reading of this claim leaves no doubt that Dyer failed adequately to allege any cognizable prejudice. An attorney's inaccurate prediction of his client's probable sentence, standing alone, will not satisfy the prejudice prong of the ineffective assistance test. *See Knight v. United States*, 37 F.3d 769, 774 (1st Cir.1994). Similarly, Dyer's self-serving statement that, but for his counsel's inadequate advice he would have pleaded not guilty, unaccompanied by either a claim of innocence or the articulation of any plausible defense that he could have raised had he opted for a trial, is insufficient to demonstrate the required prejudice. *See United States v. Horne*, 987 F.2d 833, 835 (D.C.Cir.), *cert. denied*, — U.S. —, 114 S.Ct. 153, 126 L.Ed.2d 115 (1993); *United States v. Arvanitis*, 902 F.2d 489, 494 (7th Cir.1990).

To add the finishing touch, the plea agreement that Dyer signed stated in so many words that he faced a maximum possible sentence of thirty years' imprisonment. The district court reinforced this warning during the plea colloquy, and explained to Dyer that his sentence could not be calculated with certitude until the probation office prepared the presentence investigation report. In response to questioning from the bench, Dyer acknowledged his understanding that even if he received a harsher-than-expected sentence, he would remain bound by his plea. And Dyer also assured the court that no one had made any promises to him anent the prospective length of his sentence. Thus, regardless of his counsel's performance, Dyer was well aware of the full extent of his possible

sentence when he decided to forgo a trial and enter a guilty plea.

Under the applicable constitutional standard, a failure of proof on either prong of the *Strickland* test defeats an ineffective-assistance-of-counsel claim. *See Scarpa*, 38 F.3d at 8-9. Since we find no cognizable prejudice, we need not determine what Dyer's trial attorney did or did not tell him, or whether the attorney lacked familiarity with the sentencing guidelines to such an extent as to render his performance constitutionally infirm.

We have also considered Dyer's other assignments of error. His plaint that the district court acted precipitously in dismissing the petition without first pausing to convene an evidentiary hearing is meritless. *See, e.g., McGill*, 11 F.3d at 226; *United States v. Butt*, 731 F.2d 75, 80 n. 5 (1st Cir.1984). His remaining claims are unworthy of detailed discussion. The lower court did not blunder in summarily dismissing Dyer's application for federal habeas relief.

VI. CONCLUSION

We need go no further. For the reasons discussed herein, we affirm the judgments in the LaBonte and Piper cases (Nos. 95-1538 and 95-1226, respectively); remand for possible resentencing in the Hunnewell case (No. 95- 1101); and affirm the judgment in the Dyer case (No. 95-1264) in part, but vacate it in part and remand for possible resentencing. We intimate no view as to how the district court should resolve the remaining resentencing questions.

So Ordered.

STAHL, Circuit Judge (concurring in part and dissenting in part).

With all due respect, I disagree with my colleagues that the phrase "maximum term authorized" in 28 U.S.C. § 994(h) supports more than one plausible interpretation. In endeavoring to set forth an analytically sound basis for their decision, my colleagues find ambiguity where none exists. After careful review, I believe that, when applied to defendants subject to special enhanced penalty provisions, the only plausible interpretation of the phrase "maximum term authorized" is the enhanced maximum punishment. Furthermore, once the phrase "maximum term authorized" is correctly read as referring in these instances to the enhanced statutory maximum, I think it clear that the sentencing scheme propounded by Amendment 506 does not satisfy Congress's clear command to sentence career offenders at or near that maximum. Accordingly, I dissent with respect to parts I-IV.

I.

In reaching their conclusion, my colleagues engage a full-blown Chevron inquiry twice, carefully analyzing the phrases "maximum term authorized," "categories of defendants" and "at or near."[16] On the first

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[16] 28 U.S.C. § 994(h) provides:

The Commission shall assure that the guidelines specify a sentence to a term of imprisonment *at or near the maximum term authorized* for categories of defendants in which the defendant is eighteen years old or older and (1) has been convicted of a felony that is

(A) a crime of violence; or

pass, they find, depending on the meaning ascribed to the term "categories," that the phrase "maximum term authorized" is susceptible to two different plausible interpretations. If the term "categories" is defined so that it recognizes the distinctions between defendants subject to special enhanced penalties and those who are not, then the phrase "maximum term authorized" must mean the enhanced statutory maximum when referring to the former and the unenhanced statutory maximum when referring to the latter. They define this as the enhanced statutory maximum ("ESM") interpretation. On the other hand, my colleagues contend, that if the term "categories" is read more broadly such that it fails to recognize these distinctions, then the phrase "maximum term authorized" must mean in all cases the unenhanced statutory maximum because that is the highest possible sentence applicable to all defendants in the category. They define this as the unenhanced

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(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. [§] 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. [§§] 952(a), 955, and 959), and the Maritime Drug Law Enforcement Act (46 U.S.C.App. [§] 1901 et seq.) and

(2) has previously been convicted of two or more prior felonies, each of which is

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. [§] 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. [§§] 952(a), 955, and 959), and the Maritime Drug Law Enforcement Act (46 U.S.C.App. [§] 1901 et seq.)

(Emphasis added.)

statutory maximum ("USM") interpretation. My colleagues then conclude that, because both interpretations are plausible, Congress has not spoken clearly or without ambiguity on the issue and, therefore, we should defer to the Commission's choice between the two. I disagree with this analysis because I do not believe that the USM interpretation is a plausible reading of the phrase "maximum term authorized."

Principally, I find the USM interpretation inherently implausible because it effectively nullifies the criminal history enhancements carefully enacted in statutes like 21 U.S.C. § 841. These statutes, to which Congress expressly referred in the text of § 994(h), provide an intricate web of enhanced penalties applicable to defendants who are repeat offenders or whose offenses resulted in death or serious bodily injury. The USM interpretation, however, completely disregards these enhanced penalties because, under that interpretation, all defendants must be sentenced at or near the unenhanced maximum whether or not the enhanced penalties apply. Recognizing that Congress specifically referred to these statutes in the text of § 994(h), it seems absurd to suppose that Congress did not intend to preclude this result. A plausible reading of a statute would not render meaningless complete sections of other statutes to which it refers.[17]

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[17] The majority contends that this argument is of little moment because a Career Offender guideline using the USM interpretation as espoused by Amendment 506 does not technically conflict with 21 U.S.C. § 841 or the other enhanced penalty statutes. While I agree that there may be no technical "conflict," I hardly take that as evidence that Congress intended to permit the Commission in interpreting § 994(h) to *nullify* many of the special enhanced penalties.

The reasoning of the District of Columbia Circuit in *United States v. Garrett*, 959 F.2d 1005, 1010-11 (D.C.Cir.1992), firmly supports this analysis. In *Garrett*, the court rejected the argument that the guideline phrase "Offense Statutory Maximum" should be read to refer to the unenhanced statutory maximum. *Id.* The court explained that such an interpretation (which I note necessarily requires interpreting the phrase "maximum term authorized" in § 994(h) to mean the unenhanced maximum) would "thwart congressional intent." *Id.* at 1011. The court reasoned that to conclude that "Congress . . . intended to erase the statutory distinctions among offenders based either on their past actions or on the circumstances of the offense, distinctions carefully set forth in subsection 841(b)(1)(B) *would be senseless.*" *Id.* (emphasis added). While it is true that *Garrett* involved only the interpretation of "Offense Statutory Maximum" and did not directly consider the statutory language, I think its analysis is informative and applies with equal force to the question at hand. Indeed, prior to the promulgation of Amendment 506, the Commission defined the guideline phrase "Offense Statutory Maximum" as equivalent to the statutory phrase "maximum term authorized." *See* U.S.S.G. § 4B1.1, comment. (n. 2) (Nov. 1993).[18]

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[18] Other circuits have interpreted "Offense Statutory Maximum" similarly. *United States v. Smith*, 984 F.2d 1084, 1086-87 (10th Cir.) (similarly interpreting "Offense Statutory Maximum"), *cert. denied*, — U.S. ——, 114 S.Ct. 204, 126 L.Ed.2d 161 (1993); *United States v. Amis*, 926 F.2d 328, 330 (3d Cir.1991) (same); *United States v. Sanchez-Lopez*, 879 F.2d 541, 558-560 (9th Cir.1989) (same).

Furthermore, I believe the legislative history strongly suggests that Congress intended "maximum term authorized" to refer, in appropriate circumstances, to the enhanced maximum penalty. The Senate Judiciary Committee noted that § 994(h) was enacted to replace the sentencing provisions for "dangerous special offenders" and "dangerous special drug offenders" provided respectively by 18 U.S.C. § 3575 (repealed 1984) and 21 U.S.C. § 849 (repealed 1984). *See* S.Rep. 225, 98th Cong.2d Sess. 120 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3303. These two provisions enabled courts to sentence "dangerous" defendants to terms "of imprisonment longer than that which would ordinarily be provided." S.Rep. 225 at 117, *reprinted in* 1984 U.S.C.C.A.N. at 3300; *see United States v. Thornley*, 733 F.2d 970, 972 (1st Cir.1984) (affirming "dangerous special offender" sentence that exceeded the maximum prescribed sentence for the underlying offense). A defendant was subject to sentencing under these provisions upon, *inter alia*, a finding of dangerousness. Specifically, a defendant was considered dangerous if a term of imprisonment "*longer than the maximum* provided in the statute defining the [underlying] felony '[was] required for the protection of the public.'" S.Rep. 225 at 117, *reprinted in* 1984 U.S.C.C.A.N. at 3300 (quoting 18 U.S.C. § 3575(f) and 21 U.S.C. § 849(f)) (emphasis added). As this definition makes clear, the purpose of these special offender statutes was to provide, in appropriate circumstances, enhanced punishment beyond that otherwise provided in the underlying statute. *See, e.g., United States v. Sutton*, 415 F.Supp. 1323, 1324 (D.D.C.1976). This is exactly the same rationale underlying the enhanced penalty provisions found in statutes like 21 U.S.C. § 841.

Because Congress intended § 994(h) to address these "same considerations," *see* S.Rep. 225 at 120, *reprinted in* 1984 U.S.C.C.A.N. at 3303, it seems reasonable to conclude that Congress intended "maximum term authorized" to mean the enhanced statutory maximum.[19]

In sum, because the USM interpretation would render ineffective the enhanced penalties provided in statutes like 21 U.S.C. § 841 and because the legislative history strongly suggests that Congress intended the phrase "maximum term authorized" to mean the enhanced statutory maximum, I believe deferring to the Commission's interpretation of the phrase "maximum term authorized" in § 994(h) is inappropriate.

In passing, I further note that, in large part, my colleagues' argument turns on their analysis of the term "categories" found in § 994(h). Indeed, they can only import ambiguity into the narrow phrase "maximum term authorized," by first deeming the expression "categories of defendants" fatally imprecise. Moreover, they justify the USM interpretation by

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[19] In concluding that the legislative history fails to disprove the plausibility of the unenhanced interpretation, the majority quotes the Judiciary Committee's opinion that §§ 994(h) and 994(i) would "assure the consistent and rational implementation of the Committee's view that substantial prison terms should be imposed on repeat violent and repeat drug offenders." S.Rep. No. 225 at 175, *reprinted in* 1984 U.S.C.C.A.N. at 3358. While this statement clearly suggests that the Committee trusted the Commission more than individual judges to see that recidivist defendants were sentenced at or near the maximum term authorized, it in no way suggests that Congress intended to grant the Commission the authority to disregard the sentencing enhancements provided in 21 U.S.C. § 841 and other similar statutes.

reasoning that any other interpretation would write off "the word 'categories' as some sort of linguistic accident or awkward locution."

With all due respect, I find the phrase "categories of defendants" much less troubling. First, I note that "categories" is inherently a general, imprecise term, whereas I believe "maximum" is naturally a specific, precise one. Hence, I find it eminently more plausible, in this context, to read the phrase "categories of defendants" narrowly—as referring to classes of defendants subject to specific enhanced penalties—than it is to read the phrase "maximum term authorized" broadly—as referring to, with respect to certain defendants, something less than the maximum (*i.e.*, under the USM interpretation, some defendants who are subject to enhanced penalties will be sentenced at or near the unenhanced maximum, which, with respect to those defendants, is not the authorized statutory maximum).

Second, I do indeed believe that the phrase "categories of defendants" is perhaps better understood, to use my colleagues' phraseology, as a "linguistic accident or an awkward locution." As I note *infra*, at 1418-19 [48a-50a], Congress added § 994(h) to the enabling legis-lation late in the drafting process. The subsection derives from a sentencing provision attached to other legislation that directed judges to sentence career criminals to the maximum possible penalty. In attaching it to the enabling legislation, Congress rewrote the provision borrowing the phrase "cate-gories of defendants" and other language from the already-existing § 994(i).[20]

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[20] 28 U.S.C. 994(i) provides:

In contrast with § 994(h), § 994(i)'s usage of the phrase "categories of defendants" is sensible in light of that subsection's structure. First, § 994(i) broadly instructs the Commission to assure that various "categories of defendants" shall receive "substantial" sentences, and then it proceeds to list five different "categories" of defendants to which the instruction applies. In contrast, § 994(h)'s usage of the term "categories" is peculiar. *See*, *supra*, note 16. First, § 994(h)'s sentencing command (*i.e.*, "at or near the maximum term authorized") is more precise than § 994(i)'s broad command (*i.e.*, "substantial"), and, second, its structure is different: it does not sequentially enumerate separate categories of defendants to which the command applies. Hence, I believe the para-

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> The Commission shall assure that the guidelines specify a sentence to a substantial term of imprisonment for categories of defendants in which the defendant—
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> (1) has a history of two or more prior Federal, State, or local felony convictions for offenses committed on different occasions;
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> (2) committed the offense as part of a pattern of criminal conduct from which the defendant derived a substantial portion of the defendant's income;
>
> (3) committed the offense in furtherance of a conspiracy with three or more persons engaging in a pattern of racketeering activity in which the defendant participated in a managerial or supervisory capacity;
>
> (4) committed a crime of violence that constitutes a felony while on release pending trial, sentence or appeal from a Federal, State, or local felony for which he was ultimately convicted; or
>
> (5) committed a felony that is set forth in section 401 or 1010 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. [§§] 841 and 960), and that involved trafficking in a substantial quantity of a controlled substance.

llel language in the two subsections is best understood as principally revealing Congress's intent that the two subsections should be read together. In other words, by using the parallel language, Congress awkwardly expressed its intent that § 994(h) should be read as carving out a narrow subset of criminals, otherwise subject to the broader § 994(i), that should be sentenced, not just substantially, but at or near the maximum penalty possible.

In any event, because I believe that the phrase "maximum term authorized" cannot plausibly be interpreted to mean the unenhanced maximum, I likewise believe that "categories of defendants" must be read narrowly.

II.

Deciding that the phrase "maximum term authorized" means, in the appropriate circumstances, the enhanced statutory maximum does not end the analysis. It is still necessary to consider whether the sentencing scheme propounded by Amendment 506 nonetheless satisfies Congress's directive to sentence career offenders "at or near" the maximum.[21]

The defendants contend that, when read in context, § 994(h)'s "at or near" directive is unclear and ambiguous, *see United States v. Fountain*, 885 F.Supp. 185, 188 (N.D.Iowa 1995), and, accordingly, this court should defer to the Commission's reasonable interpretation. Moreover, the defendants argue that § 994(h) is only one of many congressional directives which the Commission had the responsibility and duty to harmonize in promulgating the sentencing

[21] I do not restate the facts or describe how the Career Offender guideline operates. For a thorough discussion of these matters *see Majority Opinion* at 1400-03.

guidelines. Specifically, the defendants note that one of the main purposes of the Sentencing Commission is to reduce "unwarranted disparities" in sentencing and, thus, assure that individuals who have committed similar acts receive similar sentences. *See* 28 U.S.C. 991(b)(1)(B). They maintain that Amendment 506 achieves this goal because it eliminates "unwarranted" disparity resulting from exercise of unchecked prosecutorial discretion in deciding whether or not to seek the enhanced penalties provided in statutes like § 841.

In response, the government contends that Amendment 506 is invalid because it is inconsistent with the plain language of 28 U.S.C. § 994(h). The government argues that the sentencing ranges resulting from application of the amendment do not satisfy § 994(h)'s clear command that career offenders should be sentenced "at or near" the maximum term authorized. I agree with the government.

First, in analyzing 28 U.S.C. § 994(h), I disagree with the defendants that its command that career offenders should receive sentences "at or near" the statutory maximum is unclear and ambiguous. Though Congress undoubtedly could have been more precise in limiting the Commission's discretion in this context, the phrase "at or near" has a fairly unambiguous and narrow ordinary meaning. Common definitions of the term "near" specify that an object (or limit) is "near" another if it is "not a far distan[ce] from" or "close to" the other object (or limit). *Webster's Third New International Dictionary* (1986); *accord The American Heritage Dictionary* (2d College Ed.1985) (defining "near" as "To, at, or within a short distance or interval in space or time."). The Commission's attempt to implement the "at or near"

directive (as ultimately expressed in Amendment 506), however, does not satisfy this standard. For example, under Amendment 506, a defendant who qualifies as a Career Offender and whose punishment has been enhanced pursuant to 21 U.S.C. § 841(b)(1)(C) to a maximum possible penalty of thirty years is assigned a base sentencing range of only 210 to 262 months. Such a range is but 58.3 to 72.78 percent of the maximum possible term of thirty years (360 months). Notwithstanding a certain amount of ambiguity in the term "near" at the margins, I think it plainly obvious that a guideline interpretation that, even before any adjustment for acceptance of responsibility, prescribes such a sentencing range does not assure that defendants will be sentenced "at or near" the maximum term authorized.

Moreover, a comparison of § 994(h) with § 994(i) makes clear beyond doubt that Congress intended the language "at or near" to limit narrowly the Commission's discretion to prescribe sentencing ranges for career offenders. Subsection 994(i), which was added to the enabling legislation in the Senate prior to the addition of § 994(h),[22] provides that the "Com-

[22] The guidelines enabling legislation, ultimately enacted in 1984, has a long and complex legislative history. *See generally* Kate Stith & Steve Y. Koh, *A Decade of Sentencing Guidelines: Revisiting the Role of the Legislature*, 28 Wake Forest L.Rev. 223 (1993). Indeed, the legislation enacted in 1984 traces its roots to a sentencing reform measure originally introduced by Senator Kennedy in 1975. *Id.* at 225. Subsection 994(i) first appeared in a Senate version of the legislation in 1978. *See* S. 1437, 95th Cong., 2d Sess. § 124 (1978) (proposed tit. 28, § 994(h)); 124 Cong.Rec. 1463 (1978). The Senate subsequently added § 994(h) to a later version of the legislation in 1983. *See* S. 668, 98th Cong., 1st Sess. § 7 (1983 (proposed tit. 28, 994(h))); 129 cong. Rec. 22,883 (1983). Both provisions were part of the guidelines enabling legislation ultimately enacted in 1984. Pub.L. No. 98-473, § 217, 98 Stat. 2021-22 (codified as amended 28 U.S.C. §§ 994(h), (i)).

mission shall assure that the guidelines specify a sentence to a *substantial term* of imprisonment" for habitual offenders, racketeers, defendants who commit crimes while released on bail, and felony drug offenders. 28 U.S.C. § 994(i) (emphasis added).[23] Subsection 994(i) applies to a broad class of defendants including all defendants subject to § 994(h). *Id.* § 994(i)(1) (subsection applies, *inter alia*, to all defendants who have "a history of two or more prior Federal, State, or local felony convictions for offenses committed on different occasions"). Subsection 994(h), on the other hand, applies to a narrower subset of defendants that Congress felt must be punished even more stringently. In offering the original version of § 994(h), Senator Kennedy argued that the amendment was needed because "Career criminals must be put on notice that their chronic violence will be punished by *maximum prison sentences* for their offenses, *without parole*."[24] 128 Cong.Rec. 26,518 (1982) (emphasis added). By adding § 994(h), Congress sought to indicate that certain career offenders, with serious criminal histories, should receive not simply a "substantial term of imprisonment" as prescribed by 994(i), but instead a term of imprisonment that was

[23] *See, supra*, note 20.

[24] Section 994(h) derives from an amendment originally offered in 1982 by Senator Kennedy to S. 2572. *See* S.Rep. 225 at 175, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3358. The 1982 amendment provided in relevant part that "A career criminal shall receive the maximum or approximately the maximum penalty for the current offense." 128 Cong.Rec. 26,511-12 (1982).

at or near the statutory maximum. Indeed, if § 994(h) is only, as the defendants argue, a general admonishment—which the Commission has broad discretion to implement— to punish career offenders more harshly than it otherwise would, the subsection adds little direction not already provided by § 994(i).[25]

Second, the basic structure of the enabling legislation undercuts the defendants' argument that this court should defer to the Commission's attempt to harmonize § 994(h) with other purportedly conflicting congressional directives. The goal of avoiding unwarranted sentencing disparities is, indeed, one of the broad underlying purposes that motivated Congress's creation of the Sentencing Commission. *See* 28 U.S.C. § 991(b)(1)(B). Though Congress restated the goal as one of the directives to which the Commission should "pay particular attention" in promulgating the guidelines, *see* 28 U.S.C. § 994(f), it is nonetheless a general objective not specific to any particular guideline. The directive expressed by § 994(h), on the other hand, is a specific command aimed at a narrow class of defendants who are established as career criminals. In essence, § 994(h) is a specific exception, dealing with a narrow class of criminal offenders, that limits the discretion otherwise granted to the Commission to create sentencing guidelines. Therefore,

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[25] The point made here, that a comparison of § 994(h) with § 994(i) clearly evinces Congress's intent in enacting § 994(h) to narrow the Commission's discretion in sentencing career criminals, provides further support for my analysis in part I. In other words, it strikes me as quite odd to note, on the one hand, that Congress clearly directed the Commission to sentence career criminals at or near the maximum, while noting, on the other, that it gave the Commission complete discretion to define what that maximum is.

while the Commission should strive to harmonize the implementation of § 994(h) with other, more general, congressional directives, to the extent that § 994(h) is in tension with them, I believe that the more general directives must bend to accommodate the more specific § 994(h), rather than the other way around.

Third, I find the defendants' and the Commission's disparity arguments to be largely irrelevant in this context. One of the principal justifications cited by the Commission in promulgating Amendment 506 was the perceived need to eliminate the disparity resulting from the exercise of prosecutorial discretion in deciding whether or not to seek maximum penalty enhancements. *See* U.S.S.G.App. C, Amendment 506, at 409 (November 1994). A review of the legislative history, however, strongly suggests that the sentencing disparity that Congress hoped to eliminate did not stem from prosecutorial discretion, but, instead, from two other sources: (1) unchecked judicial discretion in formulating sentences, and (2) the imposition of indefinite sentences subject to parole board review. *See* S.Rep. 225 at 38, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3221. More specifically, it is apparent that Congress was particularly concerned by the fact that different judges—due to differing views on the purposes and goals of punishment—tended to mete out substantially different sentences to similarly situated individuals convicted of the same crimes. S.Rep. 225 at 41-46, *reprinted in* 1984 U.S.C.C.A.N. at 3224-29.[26] It is not apparent, however,

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[26] Senator Kennedy argued that sentencing guidelines were necessary because "[f]ederal criminal sentencing is a national disgrace. Under current sentencing procedures, judges mete out an unjustifiably wide range of sentences to

that Congress was overly (or even marginally) concerned with disparities resulting from prosecutorial discretion over charging decisions. Indeed, one of the principal criticisms expressed against adopting the enabling legislation was that sentencing guidelines would simply shift the unchecked discretion in sentencing from judges to prosecutors. *See* S.Rep. 225 at 63, *reprinted in* 1984 U.S.C.C.A.N. at 3246. Congress could hardly have been seeking to reduce sentencing disparities arising from exercise of prosecutorial discretion when the legislation under consideration would, if anything, enhance that discretion. Hence, the unwarranted disparities that Congress intended the Commission to correct were those primarily arising from judicial, not prosecutorial, discretion.

Finally, as I have noted, § 994(h) specifically refers to the enhanced penalty statutes (*e.g.* 21 U.S.C. § 841) to which it applies. These statutes, in turn, expressly vest discretion in the prosecutor to seek application of the criminal history enhancements. *See* 21 U.S.C. § 851. Thus, it is reasonable to conclude that Congress understood that its command to sentence at or near the maximum term authorized could result in disparate sentences for similarly situated individuals depending on whether or not the prosecutor had chosen to seek the enhanced penalties provided by the underlying statutes. Thus, I think the disparities that result from an implementation of § 994(h)'s clear directive to sentence "at or near" the maximum are not the "unwarranted disparities" that Congress charged the Commission to avoid.

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offenders convicted of similar crimes." 129 Cong.Rec. 1644 (1984).

While I am sympathetic to the concerns noted by the Commission in promulgating Amendment 506, I nonetheless find it contrary to Congress's clear command. In sum, I believe the amendment is inconsistent with Congress's clearly expressed intent to limit narrowly the Commission's discretion to establish sentencing ranges for career offenders. Accordingly, I dissent with respect to parts I-IV.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

CRIM. No. 92-69-P-H

UNITED STATES OF AMERICA

v.

GEORGE R. LABONTE, DEFENDANT

May 5, 1995

ORDER

HORNBY, District Judge.

This case involves a challenge to the legality of United States Sentencing Commission commentary to its sentencing guidelines. The Department of Justice, through the United States Attorney's office, maintains that the Commission has exceeded its powers. It therefore lies to court-appointed counsel for the defendant to seek to uphold the Commission's actions. Although I have the greatest respect for the professional competence and preparation of both lawyers, I believe that this is one instance where the adversary system has not adequately developed the legal issues. The Sentencing Commission—un-

represented here in court—is an independent commission within the judicial branch. 28 U.S.C. § 991(a); *Mistretta v. United States*, 488 U.S. 361, 361, 109 S.Ct. 647, 649, 102 L.Ed.2d 714 (1989). The United States Attorney's Office, on the other hand, is the prosecutorial arm of the executive branch. I am not satisfied that the prosecution lawyer, naturally seeking to uphold the sentence previously imposed, has fully explored with Commissioners and staff the full rationale and support for their commentary. The lawyer for the defendant, although forcefully advancing the merits of his client's case, is obviously not in a position to approach Commission headquarters and collect this information. Thus, this is one of those rare cases that cries out for a brief, independent of the Department of Justice, advancing the Commission's position. The Court of Appeals may wish to solicit an amicus brief or its equivalent, independently advancing the Commission's view, *see* 28 U.S.C. § 995(a)(23), before the Court of Appeals reaches a final decision.

In the meantime, however, I must rule. The United States Supreme Court has instructed us that "commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." *Stinson v. United States*, — U.S. ——, ——, 113 S.Ct. 1913, 1915, 123 L.Ed.2d 598 (1993); *see United States v. Piper*, 35 F.3d 611, 617 (1st Cir.1994), *cert. denied*, — U.S. ——, 115 S.Ct. 1118, 130 L.Ed.2d 1082 (1995). I conclude that, although the case is not without difficulty, the commentary under attack is not plainly erroneous or inconsistent with the

guidelines, nor does it violate the Constitution or federal statutes. I therefore follow the commentary.

BACKGROUND

Applying Sentencing Commission Guidelines and Commentary as then in effect, I sentenced George Raymond LaBonte on June 24, 1993, to 188 months in prison, the minimum of the guideline range for "career offenders." United States Sentencing Commission, *Guidelines Manual*, § 4B1.1 (Nov. 1993). LaBonte was a "career offender" under section 4B1.1 because he had two previous felony drug offenses in addition to the drug offense for which I was sentencing him. Under the career offender guideline, the guideline range depends upon the "Offense Statutory Maximum." *Id.* Under the commentary applicable to section 4B1.1 when I sentenced LaBonte, I determined the Offense Statutory Maximum (and thus the guideline range) not by looking simply at the maximum penalty for the offense he committed, but by increasing it for LaBonte's previous drug convictions in accordance with 21 U.S.C. § 841(b).

As of November 1, 1994, however, the Commission revised[1] its position and changed the commentary to

[1] I say "revised" because that is the popular perception. Actually, the pre-amendment application note stated only that " 'Offense Statutory Maximum' refers to the maximum term of imprisonment authorized for the offense of conviction." USSG § 4B1.1, comment. (n. 2). The courts consistently interpreted this to mean the maximum *after* enhancements. *See, e.g., United States v. Smith*, 984 F.2d 1084, 1086-87 (10th Cir.), *cert. denied*, — U.S. ——, 114 S.Ct. 204, 126 L.Ed.2d 161 (1993); *United States v. Garrett*, 959 F.2d 1005, 1009-11 (D.C.Cir.1992); *United States v. Amis*, 926 F.2d 328, 329-30 (3d Cir.1991); *United States v. Sanchez-Lopez*, 879 F.2d 541, 558-60 (9th Cir.1989). But whether the amendment is to a prior Commission position or to judicial interpretation of the Commission's position makes no difference to the analysis.

Guideline 4B1.1 to state clearly that in calculating a guideline sentence for a career offender, a court should consider only the statutory maximum penalty for the offense, *without* adding the statutory enhancement for past criminal history. USSG § 4B1.1, comment. (n. 2). It also made the change retroactive and therefore applicable to LaBonte. USSG § 1B1.10(c). The new interpretation lowers LaBonte's guideline range to 151 to 188 months. Although a sentencing court has the discretion whether to resentence under these circumstances, this is a case where—unlike *United States v. Piper*, No. 93-49-P-H (D.Me. Feb. 23, 1994) (declining to reduce the sentence),—I would clearly reduce the sentence to the minimum of the new sentencing range if that is within my power, and sentence LaBonte to 151 months for the reasons I set forth in sentencing him initially at the bottom of the previous guideline range.

LAW

The portion of the guideline enabling statute that provokes this controversy states that in a felony drug conviction:

> The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants [who are at least 18 years old and have previously been convicted of two or more violent felonies or felony drug offenses].

28 U.S.C. § 994(h). The Commission has tried to implement this provision through section 4B1.1 for career offenders. For defendants who meet the

criteria of section 994(h), the Commission has created a table that assigns a particular offense level to various "Offense Statutory Maximums," a term coined by the Commission. USSG § 4B1.1. Initially, the Commission defined this phrase in the commentary, application note 2, as "the maximum term of imprisonment authorized for the offense of conviction." *Id.* at comment. (n. 2.) (Nov. 1993). Courts interpreted this to mean the maximum penalty as enlarged by any enhancements available for certain defendants—such as the increased penalties the drug sentencing statute provides if the defendant has one or more qualifying prior drug convictions. 21 U.S.C. § 841(b). *See, e.g., United States v. Smith*, 984 F.2d 1084, 1086-87 (10th Cir.), *cert. denied*, — U.S. ——, 114 S.Ct. 204, 126 L.Ed.2d 161 (1993); *United States v. Garrett*, 959 F.2d 1005, 1009-11 (D.C.Cir.1992); *United States v. Amis*, 926 F.2d 328, 329-30 (3d Cir.1991); *United States v. Sanchez-Lopez*, 879 F.2d 541, 558-60 (9th Cir.1989).

In adopting its 1994 interpretation, the Commission amended the definition of its phrase "Offense Statutory Maximum," by specifically excluding "any increase in [the] maximum term under a sentencing enhancement provision that applies because of the defendant's prior criminal record. . . ." USSG § 4B1.1, comment. (n. 2). The Commission reasoned:

> This rule avoids unwarranted double counting as well as unwarranted disparity associated with variations in the exercise of prosecutorial discretion in seeking enhanced penalties based on prior convictions.

Amendment 506, U.S.S.G.App. C, at 409 (Nov. 1994).

The Government, seeking to uphold the previously harsher sentences, argues that the revised commentary is invalid because it "expressly disregards the enhanced penalty that 21 U.S.C. § 841(b)(1)(C) provides for second-time drug offenders and is inconsistent with congressional intent as expressed in 28 U.S.C. § 994(h)." Government Objection to Mot. for Reduction of Sentence at 9-10. The Government focuses on the fact that the new commentary reduces the sentences some repeat drug offenders will serve and finds this result contrary to Congress's desire for sentencing "at or near the maximum."

There are two significant difficulties with the Government's approach. First, it assesses the legitimacy of a revision only by comparing it to the previous position, rather than evaluating the overall guideline structure as amended. By focusing exclusively on Congress's desire for maximum punishments and the previous interpretation that required harsher sentences, the argument seems to imply that any Commission change that might result in lighter punishment in this area is perforce illegal. Second, it looks at only one of the mandates assigned to the Commission—that of harsh punishment—and totally ignores others, such as the directive to reduce sentencing disparity.[2] I will elaborate on the second difficulty.

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[2] The Commission is also charged in constructing its guidelines to minimize the likelihood of the federal prison population exceeding prison capacity and to take criminal history into account in sentences "only to the extent [it has] relevance" to the sentencing policies. 28 U.S.C. §§ 994(g), (d)(10). Moreover, Congress specifically directed the Commission to "periodically . . . review and revise [its guidelines], in con-

If the sole measure of the guidelines is how well they carry out a congressional mandate to be severe, then the career offender guideline fails the test even without the recent revision to commentary. The sentences resulting from the table in section 4B1.1, after allowing for reduction for acceptance of responsibility, generally achieve only 63% to 78% of the enhanced penalty.[3] Thus, under the Government's argument that in 28 U.S.C. § 994(h) Congress intended the Commission to ensure sentences literally "at or near" the maximum of the enhanced penalty, the Guidelines are defective, regardless of the new commentary. But harshness, of course, is *not* the sole measure of the guidelines. Congress has also charged the Commission to establish policies "avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct." 28 U.S.C. § 991(b)(1)(B). Indeed, Congress has emphasized its directive to avoid disparities, calling for "particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities." 28 U.S.C. § 994(f). In adopting its 1994 interpretation of section 4B1.1, the Commission specifically noted that United States Attorney charging practices had created unwarranted sentencing disparities in the application of the career of-

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sideration of comments and data coming to its attention." 28 U.S.C. § 994(o).

[3] For 25-year sentences, for example, the offense level is 34. Acceptance of responsibility, USSG § 3E1.1, could reduce that to 31 and with the automatic criminal history category of VI, yield a guideline range of 188 to 235 months compared to the statutory maximum of 300 months.

fender guidelines and advanced the interpretation as a means to end those disparities. *See* Amendment 506, U.S.S.G.App. C, at 408-09 (Nov. 1994). According to the Commission's authorizing statute, that is a legitimate and important objective. *See* 28 U.S.C. §§ 991(b)(1)(B), 994(f). Yet the case as currently presented to me does not explore the seriousness of those disparities (although every sitting sentencing judge is aware that they exist) or the extent to which the directive to avoid such disparities provides support for the Commission's interpretation.

There is an alternative to the Government's reading of section 994(h) that interprets the section within the context of the entire guidelines statute and sentencing structure. First, it is important to observe that section 994(h) places responsibility for its implementation with the Commission and there was a reason for doing so. Originally, Senator Kennedy had sponsored legislation that would have mandated the *sentencing judge* to impose a sentence at or near the statutory maximum. 128 Cong.Rec. 26,511-12, 26,515, 26,517-18 (1982). The Senate Committee on the Judiciary replaced this proposal with section 994(h), believing "that such a directive to the Sentencing Commission will be more effective; the guidelines development process can assure consistent and rational implementation of the Committee's view that substantial prison terms should be imposed on repeat violent offenders and repeat drug traffickers." S.Rep. No. 225, 98th Cong., 1st Sess. 175 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3358. Thus, the goal of section 994(h) was for the Commission to achieve a "*consistent and rational* implementation" and to impose "*substantial* prison terms." *Id.* (emphasis supplied).

Second, the Government argues that the congressional directive to the Commission to "assure" certain sentences at or near the maximum must mean at or near the maximum of *enhanced* sentences. But in actuality that is a goal wholly beyond the Commission's powers. The availability of enhanced sentences lies exclusively within the prosecution's domain; no sentence enhancement is even available unless the United States Attorney chooses to file, before the defendant's trial or guilty plea, an information listing the previous convictions. 21 U.S.C. § 851(a)(1). The Probation Office can gather and report to the sentencing judge as many previous convictions as it wishes in the Presentence Report, but none of them will enhance the statutory maximum unless the Government has filed the information before the trial or guilty plea. It is obviously the variations in prosecution practice on this subject—whether from variation in diligence, plea bargaining procedure, or other causes—to which the Commission referred when it spoke of "unwarranted disparity." The Commission can only "assure" sentences at or near the maximum penalty for the *offense as committed*, without enhancements.

Thus, to make sense of Congress's mandate, the Commission seems correct in redirecting the focus to the penalty for the offense of conviction without enhancement. The Commission *can* develop guideline policies to assure sentences at or near *that* maximum. Likewise, reflecting the legislative history in the Senate Judiciary Committee Report, it can then assure a "consistent and rational" approach, something it cannot do as long as the sentences are

measured by enhancements that remain within the uncontrolled discretion of the prosecutor.[4]

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[4] On the other hand, I am not persuaded by the Commission's suggestion that the new rule "avoids unwarranted double counting" because the guideline as previously interpreted did not result in "unwarranted double counting." The so-called double counting could come from two possible circumstances: first, the increase statutorily recognized in 21 U.S.C. § 841(b)(1) coupled with the 28 U.S.C. § 994(h) instruction to sentence at or near the maximum; or alternatively the assignment of Criminal History Category VI because a defendant is a career offender with a particular criminal history and, on top of that, a total offense level adjusted upward because of the enhanced statutory penalty. Neither of these is unwarranted double counting, however. The first is simply Congress's direction of what sentences it wants. If the Government's argument concerning Congress's intent in 28 U.S.C. § 994(h) is correct and if it overwhelms all other directives to the Commission, then there is no double counting as such. Likewise, there is no double counting in the automatic assignment of the highest criminal history category and an increase for the total offense level, because the whole exercise is simply designed to yield, by formula, a sentence that will be at or near the maximum of something, and the only question is what that "something" should be.

In making its revision, the Commission also observed:

> It is noted that when the instruction to the Commission that underlies § 4B1.1 (28 U.S.C. § 994(h)) was enacted by the Congress in 1984, the enhanced maximum sentences provided for recidivist drug offenders (*e.g.*, under 21 U.S.C. § 841) did not exist.

Amendment 506, U.S.S.G.App. C, at 409 (Nov. 1994). This statement is clearly wrong. Enhancements already existed under the drug statutes for repeat offenders. The exact amounts of the enhancements may have changed, but the concept was well in place when section 994(h) was enacted, and had been since at least 1970. *See* Comprehensive Drug Abuse

Finally, this reading also permits the Commission to consider the other objectives the sentencing statute charges it with—reducing sentencing disparity, minimizing excess prison populations, avoiding excessive weight on criminal history—rather

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Prevention and Control Act of 1970, Pub.L. No. 91-513, 1970 U.S.C.C.A.N. (84 Stat.) 1437, 1466-68.

Are these two errors enough to invalidate the revised commentary? I think not, albeit with some reservations. The revision can stand for two reasons: on the other basis enunciated by the Commission and because it is more consistent with the overall guideline sentencing structure. The incorrect reference seems to be only a (misdirected) observation in passing. It seems inappropriate, if not unfair, to deny the benefit of the revision to defendants merely because of careless research by Commission staff.

These two errors make me characterize this case as "not without difficulty." Nevertheless, I believe the text and legislative history of section 994(h) along with the other goals the Commission is directed to pursue in section 994 are sufficient to support the 1994 commentary against the Government's attack.

After drafting this opinion, I learned that the Commission on May 1, 1995, has submitted to Congress a new amendment to the section 4B1.1 commentary. The amended commentary maintains the same position substantively, but explains the Commission's rationale as follows: more precise focus on the class of recidivists for whom lengthy imprisonment is appropriate; avoidance of "unwarranted sentencing disparities"; and "consistent and rational implementation" of both the overall guidelines scheme and the specific directive to assure substantial prison terms for repeat drug and violent offenders. Amendment Notice, 60 Fed.Reg. 14,054 (1995).

By placing this explanation in the commentary to section 4B1.1, the Commission apparently has abandoned the faulty rationales it provided in the text of Amendment 506, which I have criticized above. *See* Amendment 506, U.S.S.G.App. C, at 409 (Nov.1994).

than having to treat one factor, substantial punishment, as the only matter of concern.

It is true that several courts adopted the earlier interpretation. *See, e.g., United States v. Smith*, 984 F.2d 1084, 1086-87 (10th Cir.), *cert. denied*, — U.S. — —, 114 S.Ct. 204, 126 L.Ed.2d 161 (1993); *United States v. Garrett*, 959 F.2d 1005, 1009-11 (D.C.Cir.1992); *United States v. Amis*, 926 F.2d 328, 329-30 (3d Cir.1991); *United States v. Sanchez-Lopez*, 879 F.2d 541, 558-60 (9th Cir.1989). *Stinson* teaches us, however, that "prior judicial constructions of a particular guideline cannot prevent the Sentencing Commission from adopting a conflicting interpretation," — U.S. at ——, 113 S.Ct. at 1914,—this in ruling upon an earlier Commission amendment of the commentary to the same career offender guideline. The United States Supreme Court has specifically approved commentary amendment as an appropriate way for the Commission to revise the guidelines "if the guideline which the commentary interprets will bear the construction."[5] On the arguments presented to date, I conclude that section 4B1.1's "Offense Statutory Maximum" terminology will bear the Commission's new definition and, for the reasons I have discussed, it seems to be one reasonable way for the Commission to carry out divergent congressional directives.

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[5] *Id.* at ——, 113 S.Ct. at 1919. "Amended commentary is binding on the federal courts even though it is not reviewed by Congress." *Id.* Interestingly, the commentary amendment in this case was actually submitted to Congress, *see* 50 Fed.Reg. 23,608 (1994), although I draw no inference from Congress's failure to take action on it.

Accordingly, I follow the revised commentary and reduce LaBonte's sentence to 151 months.

SO ORDERED.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Criminal No. 92-40-P-C
(Civil No. 94-305-P-C)

UNITED STATES OF AMERICA

v.

STEPHEN DYER, DEFENDANT/PETITIONER

[Filed Feb. 22, 1995]

ORDER DISMISSING MOTION TO VACATE SENTENCE

Petitioner herein, filed on October 14, 1994, a Motion to Vacate and Set Aside Sentence pursuant to 28 United States Code section 2255. Among the various allegations made therein is that trial counsel provided constitutionally defective advice by promising to Petitioner that his Base Offense Level would be Level 6, that he would not be adjudicated a Career Offender, and that he would receive a "very lenient" sentence. Petitioner also asserts that trial counsel unreasonably failed to object to an adjudication as a Career Offender or to argue that predicate offenses for that determination did not qualify as crimes of violence or as drug offenses. It is also asserted that counsel

failed to challenge certain facts which are not specified in the Presentence Report and failed to seek a downward departure based on Petitioner's physical condition, cooperation with authorities or because Petitioner's record of prior convictions over-represented the seriousness of his criminal history. Petitioner asserts that the Career Offender guideline is unconstitutional. He also asserts that he desired to withdraw his plea of guilty, but that trial counsel informed him that he could not do so.

The petition also alleges that Petitioner's failure to appear for sentencing should not have been used to enhance his Guidelines sentence and that counsel failed to explain his conduct in failing to appear to the sentencing court at the time of imposition of sentence. Petitioner also asserts that the Government breached the Plea Agreement by declining to file a motion for downward departure pursuant to Guideline section 5Kl.1. He also asserts that his guilty plea was invalid because he was under the influence of medication at the time it was tendered. Petitioner further alleges that he was entitled to an adjustment for acceptance of responsibility.

Petitioner presents no sworn affidavit to support any of his claims in this matter. He argues simply in a memorandum (Docket No. 46) that he is entitled to relief under section 2255 because of a variety of flaws, as set forth above, in the Guidelines sentencing process and in the performance of his trial counsel. Even construing Petitioner's *pro se* memorandum liberally, as the Court is required to do, and accepting as true each of the factual allegations set forth in the memorandum, Petitioner has failed to allege any facts on which it may be concluded that his sentences were imposed in violation of the Constitution or laws of the

United States, or that the Court was without jurisdiction to impose such sentences, or that the sentences were in excess of the maximum authorized by law, or are otherwise subject to collateral attack . .", the sole grounds upon which a prisoner in custody under sentence of a federal court may move the court which imposed the sentence to vacate, set aside, or correct the sentence under 28 United States Code section 2255.

The record in this case conclusively demonstrates that Petitioner is not entitled to relief as sought. *See* Rule 4(b) of the Rules Governing Section 2255 Proceedings, 28 U.S.C. fol. § 2255.

Accordingly, it is hereby ORDERED that Petitioner's Motion to Vacate Sentence be, and it is hereby, DENIED.

/s/ GENE CARTER
GENE CARTER
Chief Judge

Dated at Portland, Maine this 22nd day of February, 1995.

OFFICE OF THE CLERK
United States District Court
DISTRICT OF MAINE

WILLIAM S. BROWNELL
Clerk

U.S. District Court
One City Center
Portland, Maine 04101
Tel. (207) 780-3356

March 6, 1995

TO: ALL COUNSEL OF RECORD

RE: USA v. STEPHEN DYER
CRIMINAL NO. 92-40-P-C

Dear Counsel:

Please be advised of the following endorsement made this date by Chief Judge Carter upon the Defendant's Motion to Clarify Order:

The Court's reason was that it relied on in United States v. Hunnewell, Crim. No. 92-70-P-C (Jan. 10, 1995).

Sincerely,

/s/ SUSAN L. HALL
SUSAN L. HALL
Deputy Clerk

cc: Margaret D. McGaughey, AUSA
Neale A. Duffett, Esq.
Stephen Dyer, Esq.
U.S. Probation Office

APPENDIX D

OFFICE OF THE CLERK
United States District Court
DISTRICT OF MAINE

WILLIAM S. BROWNELL
Clerk

U.S. District Court
One City Center
Portland, Maine 04101
Tel. (207) 780-3356

January 11, 1995

TO: ALL COUNSEL OF RECORD

RE: USA v. ALFRED L. HUNNEWELL
CRIM. 92-70-P-C

Dear Counsel:

Please be advised of the following endorsement made January 10, 1995 by Chief Judge Carter upon the Defendant's Motion for Reconsideration of Sentencing:

> After full review of the Government's written submission hereon (the defendant having failed to comply with Local Rule 19), the within notice is hereby DENIED, the Court CONCLUDING that Application Note 2 is invalid as in contravention of 21 U.S.C. § 841(b)(1)(C) and 28 U.S.C. § 994(h). So ORDERED.

Please be advised that the Government's Motion Under Rule 19 to File Response in Excess of Twenty Pages was granted by Chief Judge Carter on January 10, 1995.

Enclosed please find a copy of the Judgment issued this date upon the Defendant's Motion for Reconsideration. Please note that the Judgment and the above-referenced endorsements were this date entered upon the docket in this matter.

Sincerely,

/s/ SUSAN L. HALL
SUSAN L. HALL
Deputy Clerk

Enc.

cc: Margaret D. McGaughey, AUSA
Neale A. Duffett, Esq.
U.S. Probation Office

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Criminal Action No. 93-49-P-H

UNITED STATES OF AMERICA

v.

DAVID PIPER, DEFENDANT

TRANSCRIPT OF PROCEEDINGS

Pursuant to notice, the above-entitled matter came on for Motion Hearing before the HON. D. BROCK HORNBY, in the United States District Court, Portland, Maine, on the 14th day of February, 1995, at 4:05 p.m.

APPEARANCES:

For the Government:	Margaret McGaughey, Esq.
For the Defendant:	Peter Clifford, Esq.
Also present:	Robert Napolitano, Esq.

Cindy Packard-Robitaille, RPR, RMR
Official Court Reporter

Proceedings recorded by mechanical stenography, transcript produced by computer.

[1]

[2]
(At 4:05 p.m., counsel present in open court, following proceedings transpired.)

THE COURT: Good afternoon, counsel. I just asked the clerk to get Attorney Napolitano to sit in since the two cases are similar. I understand there may be some question about his representation, but I'd like at least to have him here so we don't have to repeat the legal arguments. We'll just wait until he arrives.

Good afternoon, Mr. Napolitano. These two cases that I'm about to hear both involve the same guideline issue so I wanted to have you present, but I also understand from some correspondence from the clerk's office that there's some question as to your representation of Mr. Labonte, maybe we should straighten that out first. What is your status?

MR. NAPOLITANO: My understanding, Your Honor, is that I haven't talked to Mr. Labonte since June of '93. Diane Powers did his appeal, and I think according to the dockets that he filed his own motion for reduction back in March of '94, which was denied. I know the court would have no way of knowing the Court of Appeals, Diane Powers had worked for them.

He called me yesterday, Mr. Labonte, in response to a letter I sent him last week telling him this matter was coming up, and I think he feels since she did the appeal, she would have more knowledge of this, but in any event, I'm [3] prepared to argue it. I'm here.

THE COURT: Excuse me, you talked to Mr. Labonte yesterday?

MR NAPOLITANO: Called me collect.

THE COURT: He indicated to you Ms. Powers would be—

MR. NAPOLITANO: She had done his appeal, I said if you want her to do it, I'll tell the court. He said no, you know, sort of undecided what he wanted, that's the reason I brought it to your attention of Your Honor this morning. My understanding was as a result sometime after November 1st you had called the clerk's office sometime in December and told me about these two cases, Hunnewell and Labonte, and at that time on December 21, I think I filed a motion for reduction of sentence. I didn't anticipate obviously all these problems would come up, I didn't even know about Diane Powers at the time.

THE COURT: I understand.

MR. NAPOLITANO: That's the status.

THE COURT: So the record is clear, I think there was a memo from the probation office that probably went to government counsel and counsel for the defendants when the amendment to the guidelines went into effect listing the cases in this district that could be affected, and then I think probably I asked the clerk's office or probation in any [4] case where there hadn't been a motion filed to inquire of counsel whether there would be a motion probably—

MR. NAPOLITANO: That's what I did, I filed on December 21. Then in light of last week, the Judge Carter's decision in Hunnewell, the case I sent to Your Honor a letter indicating my understanding was from Mr. Duffett, they were going to appeal that, maybe to withdraw that. You said no, you didn't want that to happen, to show up today, that's why I'm here.

THE COURT: I don't have any opinion as to what happened with Judge Carter, I didn't want you to withdraw, that's right, in terms of the hearing for today.

MR. NAPOLITANO: Sure.

THE COURT: Why don't you be seated and we'll proceed through with the hearing and then see where to go from there. The situation is that we're talking about two cases, United States v. Piper, which was Criminal Number 93-49-P-H, in which Mr. Clifford is defense counsel, and Ms. McGaughey is representing the government; and United States v. George Labonte, Criminal Number 92-69-P-H, in which Ms. McGaughey is again representing the government. And we've just heard the status of Attorney Napolitano and the somewhat uncertainty of his representation.

And the procedural history, I guess as has been summarized, let me reiterate it, the probation office brought [5] to the attention of the Judges in this district the cases that could be affected by the retroactivity of the guideline Amendment Number 506, and these two cases could be affected by applying retroactively Amendment Number 506. And the Commission has indicated that it is one of the amendments that can be applied retroactively.

Since the motions were filed and briefed, and briefed most recently I guess by the government, I have been made aware of an endorsement by Judge Carter in United States v. Alfred Hunnewell, Criminal Number 92-70-P-C, on a defense motion for reconsideration of sentencing, in which Judge Carter's endorsement was as follows, quote, after full review of the government's written submission hereon, the defendant having failed to comply with Local Rule 19, the within motion is hereby denied, the court concluding that Application Note 2 is invalid as in contravention of 21 USC, Section 841(b)(1)(C), and 28 USC, Section 994(h). So ordered.

Now just to make a couple of comments concerning the significance of that endorsement for these cases, first of all, the law is clear that there's no binding precedential effect from a decision by one Judge of a district on another Judge, but by the same token, it is the effort certainly of the Judges in this district to endeavor to maintain consistency in the application of the law so that Judge shopping is discouraged and so that parties do not find [6] capriciousness in justice that depends upon which Judge is deciding a case.

That's one set of considerations. Another set is that without knowing anything more about the Hunnewell case than what I've just read to you, it appears that there was some defect in the defendant's submission. Local Rule 19 of course all counsel know is the rule that deals with the submission, timely submission of memoranda in connection with a motion, and I'm sure, perhaps Ms. McGaughey will enlighten us later, but it may be that the defense motion there did not have a legal argument that was presented to Judge Carter, and that's another consideration to take into account here.

Third is that part of the government's argument, not all of it, but part of it is that the amendment to the guideline commentary in Amendment 506 is invalid as contrary to statute which of course is a severe conclusion in terms of the Commission's role within the guideline sentencing where the United States Supreme Court has instructed us in *Stinson* that ordinarily, commentary should be considered binding on the courts so long as it is consistent with the statute or that it is simply interpretation of an ambiguous provision. And I say all of that simply to indicate that clearly I want to be sure that we get it right in terms of what we do.

I've been informed by the probation officer, Mr. Wahrer, [7] that he is informed that the Hunnewell case has had a notice of appeal filed, again Ms. McGaughey can probably confirm in a moment whether that's so or not in terms of its status. And with all of that, I have one preliminary question for Ms. McGaughey, which I don't mean to be impertinent, I'm sure you will understand in a moment, that is simply with respect to your authority here where the Commission guidelines being challenged, is this a challenge that's a policy within the district, or is this something that's been authorized at a higher level. I ask that simply because of the significance of the Commission guidelines and their implication.

MS. MCGAUGHEY: Would you like me to begin answering your questions?

THE COURT: Would you, please, yes.

MS. MCGAUGHEY: If I can remember them and answer them in reverse order. First question, is this a nationwide challenge or is this a challenge that is limited to the district, we have been instructed by the Department of Justice to challenge this on a nationwide basis. My understanding from the Department of Justice sources is that the first of these cases to reach a litigation posture are the now I believe eight cases in the District of Maine. We are the first ones out of the shoot [*sic*], but this is not a maverick decision by the United States Attorney in the District of Maine.

[8]

Second, if I understood your question, it was to inquire of the status of the Hunnewell appeal, I can't answer that question. I am representing the government in all of these cases.

THE COURT: All being eight in Maine.

MS. MCGAUGHEY: All of the eight in Maine. Mr. Hunnewell's was the first to be decided by Judge Carter as you've correctly pointed out. A notice of appeal has been filed in that case, it has been docketed, and an original briefing schedule was set for March 3rd, 1995. However, in the interim, Neale Duffett who was the Maine attorney who represented Mr. Hunnewell moved to withdraw, that motion was granted, and an attorney from Boston has entered an appearance in the case. I have not yet been notified as to whether that will change the briefing schedule or not. Certainly the government within the realms of reason will endeavor to move these, move that case as expeditiously as it can, both for the consequences in the District of Maine and for the consequences nationwide in terms of its precedential value.

THE COURT: Tell me again the schedule that was in effect.

MS. MCGAUGHEY: It was in effect that the defendant's brief was due on March 3rd, the government would have had 28 days to respond. I can represent as an officer [9] of the court that that would not have been required, that our turnaround time would have been substantially faster. Had the case proceeded in the ordinary course, it would have been possible for the case to have been on the May list for oral argument. I don't know one way or another whether that will occur because I don't know whether new counsel for Hunnewell will move for an extension or not.

THE COURT: While we're on Hunnewell, is the issue clean in Hunnewell, or it is complicated by the Rule 19, Local Rule 19 issue?

MS. MCGAUGHEY: At the risk of sounding impertinent to the court, I would rather not take a position on the Rule 19 issue. I can, however, represent to you as the attorney who has handled all of these cases that the issues on the merits with respect to the invalidity of the new application note are consistent in all of the cases, that with the exception of I believe two sentences, which I discovered in Mr. Piper's case, it's almost verbatim. However, I would also point out to the court—

THE COURT: I'm sorry, what's verbatim?

MS. MCGAUGHEY: The legal argument with respect to the invalidity of the new application note is almost verbatim in each of those cases, I know that because I wrote it in all of them.

THE COURT: My question is this simply, can we be [10] reasonably confident that the First Circuit will decide on the merits the validity of the amendment, I know you can't be completely confident, that's what I meant by a clean case as to whether that issue is sufficiently focused that we're likely to get a decision on it.

MS. MCGAUGHEY: Well, as Your Honor knows from having periodically sat as a member of the First Circuit, an appellate court is required to examine the case as a whole and if a court below reaches the right result for the wrong reason, the appellate court not only has the right, it has the duty to examine the alternative grounds. So to that extent, is the issue with respect to the invalidity of the new application note squarely presented, yes, it is, because Judge Carter's opinion in the government's view if it doesn't incorporate by reference the arguments that the government made, it certainly provides a basis for the appellate court to conclude that the government's

arguments may have entered into Judge Carter's thinking on the merits.

THE COURT: All right.

MS. MCGAUGHEY: If I may make one more comment.

THE COURT: Yes.

MS. MCGAUGHEY: And that's simply to point out to the court that in Mr. Labonte's case and Mr. Piper's case, the government has made alternative arguments.

THE COURT: Right.

[11]

MS. MCGAUGHEY: And in each of those, one is the pure legal issue of whether the application note is invalid, but the second is the fact bound specific argument with respect to this court choosing to exercise or not exercise its discretion under the statute to revisit the sentence assuming that the guideline application note applies.

THE COURT: Thank you, Ms. McGaughey. That very helpful, and it puts I think these cases in this posture. On the one hand, both of these defendants are under sentences that have a long way to go and there is no particular urgency to a resolution of the matter before us today, it won't affect their release within the reasonably foreseeable future. And so on the one hand, a decision by the First Circuit in Hunnewell if it dealt with the merits could in fact resolve both cases if it came down in the government's favor. If it came down against the government, then we would have the issue still presented.

I think the alternative that Ms. McGaughey has just referred to is that the government in each of these cases is arguing to me that even if the guideline

amendment is valid that there are other reasons why I should remain with the sentence originally imposed. I suppose we could go forward on that issue in each case and reach a resolution, and I suppose the possibilities are that I would agree with the government in both cases, which could then end these cases regardless [12] of the outcome of Hunnewell, assuming that I made a decision that was otherwise appropriate.

Alternatively, I might disagree with the government in both cases, and in that event, the Hunnewell decision would again become material. Or still again, I might agree with the government in one case and not in the other, in which case we'd have one that would be done and one that would be ongoing.

So let me inquire of all three of you what your advice to me is in terms of the most efficient and expeditious way of proceeding. Is it to let these matters simply stay in abeyance while we wait for a decision from the circuit on Hunnewell, is it to move forward and hold argument and to deal with the nonvalidity issues or what, and let me hear from defense counsel first, I'll come back to Ms. McGaughey. Mr. Clifford.

MR. CLIFFORD: Your Honor, with respect to Mr. Piper, there is another important factor, that's there is a petition for certiorari which is still pending.

THE COURT: I'm glad you raised it. Do I even have jurisdiction to hear your motion?

MR. CLIFFORD: I think you do, Your Honor, the primary reason that I filed the motion was of course I wanted to make sure that I presented it and didn't waive it. At the same time, I'm still optimistic the certiorari petition may [13] be granted although I have to acknowledge that all of the other cases have

been denied, and I don't have very high hopes for the petition. So I expect as a practical matter that it will be denied, although of course it's still pending. I called the court this afternoon right before I came here, and according to the computer system there it's still pending.

THE COURT: But you maintain that while the petition is there, there's nevertheless jurisdiction in this court. I've not had to deal with this for a long time, I've forgotten the answer to that.

MR. CLIFFORD: Your Honor, because I suppose I'm not prepared to answer that question—

THE COURT: All right. We'll hear from Ms. McGaughey.

MR. CLIFFORD: —in any detailed sense, I certainly would defer to the government on that point, but I think that in order to avoid a waiver of the issue, I felt that I needed to file.

THE COURT: I don't challenge what you did, I'm only asking what I should do. Where does all of that lead you?

MR. CLIFFORD: I suppose the court would be required to keep this particular matter in abeyance until the petition is decided because certainly if the petition is [14] granted and assuming that Piper wins his appeal on the career offender issue, all of this would be an academic exercise with respect to him. But all those possibilities are uncertain by any stretch.

THE COURT: So do I gather your overall suggestion is you would just as soon wait a while to see what happens at least on the petition for certiorari and possibly on the Hunnewell outcome?

MR. CLIFFORD: Your Honor, I would wait with respect to the certiorari, but I would be prepared to

argue it today and maybe to watch what the other decisions are, but I've prepared the argument, I feel able to argue it, and I think the court could keep its decision on hold until the certiorari. And I would certainly notify the court as soon as that came out, that would be the most efficient course. I don't see any need to come back here and reargue it all over again.

THE COURT: Is your argument on validity or is it on the appropriateness of Mr. Piper for relief.

MR. CLIFFORD: It's on both grounds, Your Honor.

THE COURT: The validity may be something where we're all wasting our time if the First Circuit logically is going to get to decide that in Hunnewell first because then what I say will be irrelevant if once Hunnewell comes down, that will be law of the circuit.

[15]

MR. CLIFFORD: If the Hunnewell decision was decided without the procedural problem, I would totally agree with the court. But I'm a little nervous that the Rule 19 deficiency might create a decision in which there's a procedural problem and the appeal is denied on that basis, and therefore, the merits wouldn't have been reached. And I agree that it's—there's a lot of different cases to consider, I'm not sure how the other cases are going, but I would prefer to discuss the legal issues today if possible.

THE COURT: All right. Mr. Napolitano, I'm probably way beyond your authority, but where are you with Mr. Labonte.

MR. NAPOLITANO: I said in my letter last week, Your Honor, I think it would be prudent to wait until the Circuit Court of Appeals, I think they're going to

decide the case on the merits, have nothing to do with Local Rule 19.

THE COURT: Thank you. Ms. McGaughey.

MS. MCGAUGHEY: Your Honor —

THE COURT: Also like to hear you on the certiorari question.

MS. MCGAUGHEY: It baffles me, however, having looked at FRAP 41, which deals with the issuance and stay of mandate after an appellate opinion, my cursory reading of Rule 41(b) indicates to me that mandate, that is the ability of this court to resume jurisdiction does not automatically [16] stay when a petition for writ of certiorari is filed, but only is stayed when there is a motion, reasonable notice to the parties. I confess my ignorance of not knowing, I believe mandate has issued after the direct appeal of Mr. Piper's conviction, but I don't know.

THE COURT: Well, hang on, I think I can tell that from the file. Yes, we received the mandate October 6 of '94. So the mandate issued, which would at least initially put jurisdiction back in this court, and I guess what you're saying makes some sense that at this stage then, what Mr. Clifford has is a petition for certiorari which doesn't vacate the mandate until the petition is granted, or until some stay is otherwise entered, is that what you're suggesting?

MS. MCGAUGHEY: I am suggesting that in part based on the difference between an appeal as of right to the First Circuit and a petition for writ of certiorari to the Supreme Court, whereas the former is a matter of right, the latter is a matter of discretion. And I'd be happy to research it for the court, but my instincts tell me that mandate having issued, and not been stayed, and cert. being a discretionary remedy

that jurisdiction does lie in this court to consider the case on the merits.

THE COURT: All right. And what is your position in terms of the prudent way to proceed in light of all the [17] various uncertainties?

MS. MCGAUGHEY: Well, Your Honor, there are I think arguments to be made on either side. I think in going to what I consider to be one of the human interest issues, I think there may be a penological interest in having the court decide the issue now. Hope springs eternal, each of these defendants may labor under the illusion that their chances for a sentence reduction hinge on what happens in the Hunnewell case. That does not dispense with the arguments that I have made with respect to each of these defendants that regardless of whether the amendment is valid or not valid that the sentences originally imposed on these defendants should stand.

I can see an argument for waiting, the problem with that is that if there is an extension in the Hunnewell case, these cases will be on hold for at least six months. And question of whether this court would rather forge ahead and make its own decisions or whether it would prefer to await the outcome of the First Circuit, I'm going to be here in any event, I'm going to be handling the appeals in any event.

THE COURT: What she's offering is to you, Mr. Clifford, a chance to take the appeal instead of Mr. Duffett's.

MR. CLIFFORD: Frightening, based on my experience with the First Circuit, I'm not sure I have any interest [18] in that. Your Honor, I guess I would amend my earlier remarks to the extent that the court does have jurisdiction, it would seem to me that—that it could actually render a decision in this

matter, and on the assumption that the certiorari basically is discretionary and that jurisdiction exists here.

THE COURT: Let me hear your argument, you're here, Ms. McGaughey is here, let me hear your argument and then we'll figure out what to do with Mr. Labonte in a moment.

MR. CLIFFORD: Your Honor, I note that the court mentioned the applicability of *Stinson* earlier, and I think it's clear that *Stinson* is the governing case, and in many respects, procedurally, it's remarkably similar to this case. In *Stinson*, the issue was the applicability of an amendment, Amendment 433, which stated in essence that possession of a firearm is not a crime of violence for career offender purposes. And the Court of Appeals in that case as well as the District Court concluded that for a variety of reasons, primarily because the guideline commentary was without effect, that Amendment 433 was irrelevant and that it wouldn't mandate a resentencing.

The United States Supreme Court was quite explicit in that case in delineating the deference that is to be accorded to the Commission. It went out of its way to, seemed to me to lecture to the courts that it really—that really second guessing of the Commission should not occur. In the absence [19] of what the Supreme Court described as a violation of statute, not even an inconsistency, it went I think a little higher and stronger by saying that the court must find in order to vacate the Commission's commentary that there's been a violation of statute, which brings us to the two statutes which the government has been arguing.

The first one, Section 841(1)(b)(1), in essence states that for a person of Mr. Piper's position who has multiple convictions for drug trafficking, that the range shall be from 10 to life. Assuming that the government's position is correct, that that is—that is the maximum, that 841 wouldn't apply, there's no inconsistency with the resentencing proposed by the Commission, as long as the guideline sentence is at least 10 years, which it is and that's undisputed, there's certainly no inconsistency with Section 841.

And the government I think very cleverly argues that as a matter of law, the maximum sentence allowed according to some precedence [*sic*] which predate *Stinson* is that the maximum allowed by statute including a statute which looks at prior offenses, but I think that critical structure that the government relies on should not be relied on by the court.

First of all, it predates *Stinson*, all four cases cited by the government were decided before *Stinson*. Those cases are the *Smith* case, which is at 985 F.2d, the *Garrett* case [20] which is at 959 F.2d, and the *Amis* case, and the *Sanches-Lopez* case. All of those cases according to the government suggest that the maximum term authorized as a matter of law, and despite the Commission's pronouncements afterwards, require the court to find that the maximum in this case is life and that's the benchmark which should be used for guideline purposes. All of those cases should be irrelevant in the wake of *Stinson* and in the wake of Amendment 506.

So really what we're left with is an analysis of Section 994(h) under Title 28, which is of course the statute which was at issue in Piper's direct appeal. I don't think it can be argued in any sense that Amendment 506 is inconsistent with section—statute,

Section 994, Section (h). First of all, the conspiracy offense is not even referenced in any way, shape, or form in Section 994. And again, the—at most what we see are relatively vague and ambiguous references to maximum term, it doesn't even say authorized by statute. And it doesn't say, it certainly doesn't reference 841(b)(1)(B).

And so quite simply, because there's no inconsistency with either the 21 USC 841 or 28 USC 994(h), I don't think the government's position is very solid.

THE COURT: Well, a maximum term if you have the previous convictions is higher.

MR. CLIFFORD: Your Honor, the maximum term is [21] actually defined by the Commission, and again, according to *Stinson*, since if there's any remote possibility that that phrase can be interpreted in any number of ways—

THE COURT: What's the ambiguity in the phrase, at or near the maximum term authorized?

MR. CLIFFORD: The ambiguity would be pointed out by the text of the commentary itself where—in which it claims that offense statutory maximum, again, this is Application Note 2 as it's been amended, I'm going to go to Amendment 506 because I don't think the new language is actually in the text. And the Commission's interpretation of that language is certainly rational and certainly entitled to great weight, and I think—

THE COURT: What 506 explanation that didn't end up in the commentary says is that the amendment defines the term offense statutory maximum to mean the statutory maximum prior to any enhancement based on prior criminal record. Now the reason given for that interpretation is one, to avoid unwarranted double counting; two, unwarranted disparity that

results from variations in the exercise of prosecutorial discretion. And then there's a third argument, that when the instruction underlying 4B1 was enacted, according to the Commission, the enhanced maximum sentences for recidivist drug offenders didn't exist. The government has said that's untrue, but that's the arguments that were made.

[22]

But I see all of those, I guess I come back to my first question which is what is ambiguous in the 994(h) phrase, the maximum term authorized. Isn't the maximum term authorized for Mr. Piper, the higher term.

MR. CLIFFORD: No, I don't think necessarily, Your Honor, because for instance, the offense could be categorized as just the generic offense of conspiracy. And the 841(b)(1) could have been categorized by the Commission as a sentencing provision looking at criminal history as opposed to an offense. And so to conclude automatically that the offense refers to the offense for a given person with a given criminal history is a stretch.

Now is certainly is a rational interpretation, and I think the four cases predating *Stinson* took that approach. But I think if you look at the argument as being one of criminal history as being separate and distinct from offense conduct, then the Commission's interpretation and commentary is certainly rational and certainly respects the integrity of Section 994, the statute. And so if you separate offense conduct from criminal history and you look at offense conduct as what is generating the cap for the career offender situation, you have a situation that's consistent. And

under *Stinson*, that is—has got to be afforded some weight.

THE COURT: Go ahead.

MR. CLIFFORD: That is in essence my position, is [23] that —

THE COURT: Then let's go past the validity question, assume I agree with you for the sake of argument on the validity issue, Ms. McGaughey argues that in any event, I shouldn't give a reduction to defendant Piper because of his particular circumstances as reflected at the sentencing, and that even although I may be authorized to apply 506 retroactively, I shouldn't do it.

MR. CLIFFORD: Your Honor, I'm a little puzzled with the government's position based on the sentences given to the other six people involved in this case. I understand that Piper's history is different. I would point out to the court that despite a lot of analysis of his record, in terms of just looking at convictions, in looking at things that count for sentencing points, criminal history points, really what we see is a guy whose [*sic*] had two prior drug trafficking convictions. He's—there's a number of firearms things out there, but they're not counted, and I think they're irrelevant for career offender purposes.

When you look at some of the sentences that have been given to the other six people in this case, I know the court's very familiar with that, it's very hard to single out the government's—this particular gentleman's conduct versus the other people.

THE COURT: Remind me is he the second highest, [24] it's been some time since I did this, remind me where he fits in the sentencing range.

MR. CLIFFORD: I believe he's the highest, Your Honor, has been given a sentence, total sentence of 30 years.

THE COURT: The next highest, do you remember what that is?

MR. CLIFFORD: I believe that might be Mr. Cook who was a career offender, but where there was a departure taken.

THE COURT: Mr. Wahrer, do you remember, do you know.

MR. WAHRER: The best of my memory, Your Honor, the next highest sentence would be Mr. Connolly.

THE COURT: Connolly.

MR. WAHRER: Who received I think a sentence of something close to nine to 10 years, I believe Mr. Cook would probably be the next one, I think his sentence, close to seven.

THE COURT: Thank you.

MR. CLIFFORD: The government is attempting to portray Mr. Piper as his conduct as just unparalleled by anyone in recent memory, and while I'm not endorsing the conduct, I think that the ultimate benchmark is the sentences received by the other people in this matter. I think under the structure of the guidelines that that's got to be a [25] primary consideration of the court, that there should be some equality in the treatment of the seven coconspirators.

THE COURT: That at the time didn't move me enough to give him the minimum under the range, as you will remember, that I put him I think at a high middle range of the guideline sentence; is that right?

MR. CLIFFORD: It is correct, Your Honor, but it is also correct that I think the court viewed its role as looking at the guideline itself and looking, you

know, paying homage to the guideline and finding that the conduct on top of the requirements of the career offender scheme required boosting, boosting the sentence somewhat, but it really, I think, I would suggest that that kind of analysis would go to the revised sentencing range under this amendment, and I don't think it should—really should be discussed in terms of Amendment 506 and its validity, I think that's largely a legal issue. Again, I don't think that the court should pick and choose which people warrant this special treatment of retroactive treatment. I think that—

THE COURT: Isn't that what the retroactivity amendment contemplates, it's not mandatory; is it?

MR. CLIFFORD: It's not mandatory, Your Honor, but I think that the policy provision that has been enacted by the Commission is again entitled to great weight. And as a practical matter, under the scheme announced by the [26] guidelines and the *Mastratic* case and *Stinson*, I think that uniformity has got to be a primary consideration and that—

THE COURT: Well, I understand that policy argument in the abstract, but there's nothing in the guidelines, is there, that says that all the defendants in a district must get it or none of them?

MR. CLIFFORD: Not that I can see, Your Honor. But I think that ultimately, according to some of the decisions that I read about retroactivity, most notably *Connell*, there really hasn't been much law on that point, but I would expect it almost would be analogous to an upward departure. There's got to be compelling reasons perhaps to single out somebody to not get the retroactive treatment if the court would conclude that the Commission's actions have been consistent with the statutes that are at issue.

There's another area in the government's brief relating to the possibility of an upward departure, I'd like to quickly point out that at the sentencing conference in this matter, the government withdrew its motion for an upward departure, and at the same time, Mr. Piper withdrew his contesting of the quantity. And so I don't think the government should be allowed to argue for an upward departure at this point.

THE COURT: Well, I take it the government's not arguing for an upward departure, what the government is [27] saying if I find that the amendment is valid, as I exercise my discretion whether to apply it retroactively, I should recognize that when the amendment lowers the range, that then an upward departure might be appropriate, and therefore I should leave things alone, that strikes me as a different question as to whether under things as they were, the government sought an upward departure or not.

MR. CLIFFORD: Your Honor, I still don't see any grounds for an upward departure based on the conduct. I know that's debatable, but especially when you look at the incredibly high sentence posited by that range.

A final point I'd like to make relates to the life expectancy of Mr. Piper who is age 50. The government noted I think Page 16 of its brief that by any stretch of life expectancy tables, Mr. Piper would not be receiving a sentence at or near life imprisonment, and I want to take issue with that. Under the—I think when his age is considered and the fact that he's in prison, which certainly doesn't help one's life expectancy, and I don't have any evidence to support what I'm saying, but I think it certainly is debatable

that a 20 year sentence for a man who is 50 years old will be a life, or at or near life sentence.

And I think that a rational decision would be that that—the amended revised sentencing range posited by the Commission would be a sentence at or near life, and for that [28] reason, I think that there's no inconsistency with Section 994(h), assuming the worst case scenario which is otherwise the court would find an inconsistency, in Piper's particular case, the new guideline sentence posited by the court would still be at or near life. And I think that's a factor, and if the court wanted expert evidence in terms of life expectancy issues, perhaps that could be garnered. It certainly is an important issue to Mr. Piper and would certainly warrant some investigation if the court believes that was an appropriate issue.

THE COURT: Thank you very much, Mr. Clifford. Ms. McGaughey.

MS. MCGAUGHEY: If I may go back to the beginning on the question, the legal question of the validity of the application note. I think Your Honor put his finger on it and that is there is absolutely nothing ambiguous in the authorizing legislation which says that for career offenders, the Commission shall promulgate guideline ranges that are at or near the statutory maximum. I think there's absolutely nothing unclear about that.

Now whether Mr. Piper who is a 50 year old man facing 27 years or 37 years is a or near the top, or whether in Mr. Labonte's case, the amendment produces a different result, which is somewhere between 70 percent and 58 percent of the statutory maximum, I don't think ought to make a difference. [29] I think what this court ought to do is compare that clear language to what the Sentencing Commission has

done. The Sentencing Commission has instructed courts to disregard what Congress has told them. Congress has told courts that when a defendant is a repeat drug offender, that the court—that the maximum shall be increased, it's not a discretionary thing, it is a mandatory thing. And in the pecking order of things, the Sentencing Commission does not have the authority to abrogate an act of Congress.

A guideline is not an act of Congress, it does not pass the House of Representatives and the Senate, it is not endorsed by the President. It is an act of an agency. And when an agency chooses to disregard, A, its enabling legislation; and B, a clear mandate of Congress, that the maximum shall be increased, in the government's view, the guideline becomes in abrogation of both of those statutes, not just one, but both of them.

THE COURT: Remind me, are the guideline amendments placed on the table in Congress?

MS. MCGAUGHEY: My understanding, Your Honor, and I asked this question of someone in the Solicitor General's Office, my understanding is that the process for review is different for guidelines and guideline commentary. And my understanding is that there is no procedure for congressional review of guideline commentary, which is what this is.

[30]

Now this brings me back to the *Stinson* point. I may be thick, but I think that *Stinson* sheds only very marginal relevance on this case. What *Stinson* stands for is the now unremarkable proposition that the Sentencing Commission can only do what Congress authorizes them to do. And that if it's a gray area, that the Sentencing Commission can be pre-

sumed to be acting within their statutory mandate, but this is not a gray area.

This is an area where the guideline commentary expressly disregards three separate provisions of 841 in the sentencing provisions, and in addition, that the resulting guideline ranges that are produced if this amendment takes effect produce sentences that are nowhere near at or near the statutory maximum as Congress has defined it.

Now if I may turn for a moment to the discretionary arguments unless the court has more arguments on the—

THE COURT: Just pause for a moment, I'm looking 841, which in Mr. Piper's case, we are dealing with what, (b)(1).

MS. MCGAUGHEY: I get lost every time, it will take me a moment to catch up with you, Your Honor. In Mr. Piper's case, it's 841(b)(1)(B).

THE COURT: (b)(1)(B).

MS. MCGAUGHEY: It provides in essence that if a person commits such violation after having committed a [31] previous violation for a felony under the laws of the United States or any state, that such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life.

THE COURT: Let me find it, just a moment. Yes, okay. Come back to 994(h). All right. Go ahead.

MS. MCGAUGHEY: Just to follow, if I understood the court's train of thought, 994 reads that the Commission shall assure that the guidelines specifies a sentence of imprisonment at or near the maximum authorized for people who fit the—

THE COURT: I was looking at the next phrase which is categories of defendants in which, and then

the list is, has been convicted of a crime of violence, or an 841 conviction, and I take it your argument that the categories go with whether you had a previous conviction, go with quantities, go with things of that sort. Is that correct?

MS. MCGAUGHEY: Correct.

THE COURT: Go ahead.

MS. MCGAUGHEY: Turning again to the discretionary arguments that pertain to Mr. Piper, as I read this court's remarks at the time Mr. Piper was sentenced to 300 months on Count One, the court said before it pronounced that sentence that Mr. Piper was getting a sentence that he deserved. And in the government's view, nothing about the facts and [32] circumstances of his case have changed to make that anything other than the sentence he deserves.

Mr. Clifford has argued that somehow this court ought to exercise its discretion to apply the amended note to his client and perhaps not apply it to other defendants in this district for the purposes of achieving parity among co-defendants within the same case. Although it is not directly on point because it is in the context of a departure, the First Circuit has said that this court should not impose different sentences simply for the purposes if achieving parity with respect to defendants in the same case, that's the *Wogan* case.

But more important, as this court pointed out at the time Mr. Piper was sentenced initially, he has very few convictions that can be counted for criminal history purposes, but a whole host of non-includable convictions that demonstrate an increasing coincidence of guns, drugs, and violence, and those are charges that have never produced criminal convictions for this defendant.

If I recall the court's summary of Mr. Piper's past, it is that he is—has opened the door to more and more violence and more and more drug activity in his life. There's nothing about this defendant that warrants this court exercising its discretion to reduce his sentence at this point.

[33]

THE COURT: Let me ask you about that discretion question, do you maintain that—assuming for the moment that the guideline is valid, that the retroactivity issue is discretionary with the court, and if it is discretionary, what are the factors that need to be enumerated by appellate case law if any in terms of the exercise of the discretion.

MS. MCGAUGHEY: Well, the authority for the proposition that it is discretionary if found both in terms of 18 USC, Section 3582(c)(2), and in terms of the First Circuit's interpretation of that statute in the *Connell* case. What the statute says is that if a range of imprisonment has been reduced by virtue of an amendment to the guidelines that the court may reduce the term of imprisonment after considering the factors set forth in 3553 which are the factors pertaining to the offense and the offender, to the extent they are applicable if such a reduction is consistent with the applicable policy statements issued by the Sentencing Commission.

So I think what the statute contemplates is that if the court is satisfied that an amendment has been made retroactive that what the court should do is go back and look at the sentence and decide whether the factors that led it to impose the sentence in the first instance warrant keeping that sentence in place or whether something has drastically changed to make

it a different—make a different sentence [33] permissible and in order. As I understand the First Circuit in *Connell*, it has interpreted the statute to mean that it merely affords the sentencing court discretion to use the amendment if it chooses to do so.

THE COURT: I guess what I'm asking is that do I as I make that decision have to go through the litany of factors in 3553 and make new findings on each of them to determine either to exercise my discretion to go retroactively or not?

MS. MCGAUGHEY: I think what you can do to short form that, if you choose to do so, the court made a very ample statement of reasons in imposing the sentence in the first instance, I think the court has heard full oral argument from the parties, the factors are clearly in the court's mind. I think the court can say for the record, if the court chooses to do so that having reviewed the statement of reasons given at the time sentence was initially imposed and having considered those in light of the amendment to the guideline, that the court is persuaded that its discretion should be exercised to leave the sentence in place. And I think that will suffice. At least I'd be happy to defend it on that basis.

THE COURT: If I did it you'd be the one that would have to. Anything further, Ms. McGaughey?

MS. MCGAUGHEY: Nothing, thank you.

THE COURT: Thank you. Any brief rebuttal?

[35]

MR. CLIFFORD: Yes, Your Honor, very briefly. We almost get back to the exact issue that was argued on appeal, and that is, the meaning of Section 994(h), that does not list conspiracy as one of the enumerated offenses. And so the government's argument that the

Amendment 506 is inconsistent with Section 994(h) is not correct in the sense that the conspiracy offense isn't even listed in that category, that the five enumerated drug offenses chosen by Congress. I think that the First Circuit's reasoning that it was a floor and not a ceiling to use the First Circuit's words had to be premised on the Commission's broad authority under Section 994(a) which is general empowering authority.

So when the government says that Amendment 506 is inconsistent with 994(h), I think certainly a literal reading renders that an incorrect view, and certainly, to the extent the Commission is entitled to interpret Section 994, that the government really cannot disagree with the Commission's own pronouncements because they are entirely consistent with one another. It's only when the Amendment 506 is found to have violated, and the critical statute is 994, that its commentary can be disregarded at least on the legal issue.

And on the discretionary issue, I think that the court's primary function is to look at the guideline range, and again, defer to the Commission's pronouncements. That's all I have.

[36]

THE COURT: Thank you very much.

MS. MCGAUGHEY: Your Honor, may I make one brief comment?

THE COURT: That's fine, thank you. All right. Counsel, thank you, I've benefited from your argument on this as well as the written materials that were filed. And of course I have been the sentencing Judge in the Piper matter so I'm familiar with the whole context, and I did take the opportunity to re-

view the presentence report and also the transcript of my sentencing remarks in the matter.

And at this time, I am in the Piper case going to deny the motion for reduction of sentence. I will assume in this case for the purposes of argument that the guideline amendment that the Commission promulgated is valid and within its authority under the statutes. It's clear from the Commission commentary that this is one of the guidelines that may be applied retroactively, but I also am aware of the *Connell* case and the First Circuit's suggestion as well as the statutory language which is permissive that makes it a discretionary matter as to whether to apply the amendment retroactively.

I did at the time of sentencing consciously impose a sentence that was not at the minimum of the guideline range because in fact I did consider very seriously the circumstances of Mr. Piper's activity in the underlying [37] offense, as well as the criminal history, both counted and uncounted, and made clear to him on the record my concern with what had taken place in his life and the appropriateness of the very high sentence that I imposed which was not at all the minimum sentence that I might have imposed.

I am now looking at Section 3553 of Title 18 which lays out the list of factors that a court is to determine —excuse me, is to consider in determining a sentence. I'm not going to enumerate each one of them again because I don't think that that is necessary, since in fact I did go through the detail of establishing a sentence at the time of sentencing, and I'm satisfied that nothing in this case has changed my opinion and that was the right sentence for Mr. Piper. It was a hard sentence, without a doubt, probably one of the

harder sentences that I've had the occasion to hand down, but I considered it an appropriate sentence.

And although the Commission has now provided for the availability of a retroactive guideline amendment to reduce it, I do not see the grounds for doing that in this case given the nature and circumstances of Mr. Piper's offense and Mr. Piper's history and characteristics. So I'm denying the motion on that basis rather than on the basis of invalidity, and that is the reason for doing so, and again I do thank counsel for their presentations.

Now with respect to Mr. Labonte, moving on to that case, [38] let me just say at the outset, before we go any farther, that I'm sure both counsel are aware that unlike in the Piper case, in Mr. Labonte's case, I did choose the absolute minimum sentence that was available under the guidelines and also expressed my realization that in part what Mr. Labonte was doing was feeding his habit as opposed to being involved as a trafficker for profit and so his circumstances are somewhat different than Mr. Piper's, and I therefore —again I guess I've heard from Mr. Napolitano suggesting that waiting is appropriate in Mr. Labonte's case. And I would be inclined to do that here, Ms. McGaughey, unless you have a strong reason not to for a couple of reasons; one, the uncertainty of the representation; and two, the validity or invalidity of the Commission's amendment would, if it's invalid, it would moot otherwise the consideration of whether there should be a recalculation of that sentence. Is there any good reason for me to press forward in Labonte today under those circumstances?

MS. MCGAUGHEY: I can see reasons to press forward, but I certainly am not going to take vigorous opposition to the court's decision to wait. I would

simply point out that the legal argument with respect to Mr. Labonte about why the amendment does not produce a sentence that is at or near the top specified is very clear, and that it is much easier for the court to see in stark perspective why this amendment is [39] in contravention of the statute.

THE COURT: But I would be dealing then with, in fairness to Mr. Napolitano, with an argument where the adversary process really hasn't had a chance to have its effect.

MS. MCGAUGHEY: I understand that. If the court's principal reason for delay or one of them is to clarify the question of who is to represent Mr. Labonte, I can't take issue with that.

THE COURT: I think that's appropriate because I know, Mr. Napolitano, you're in an uncomfortable position, it's also probably not fair to your client to have—except to have this presented.

MR. NAPOLITANO: That was the reason I sent him the letter, Your Honor, last week he called me collect. I have talked to Diane Powers, she would be happy to, given some time, she couldn't be here at 4:30 today, she just knew about it today, she'd be happy to represent Mr. Labonte.

THE COURT: I don't know Ms. Powers, does she do a fair amount of this kind of practice?

MR. NAPOLITANO: Yes, she does.

THE COURT: Are you familiar with her through your appellate work?

MS. MCGAUGHEY: I have not appeared opposite her that I can remember.

[40]

THE COURT: All right. I'm going to not take any action on Mr. Labonte's request, the motion is pend-

ing, so the matter is preserved. Mr. Napolitano, you should talk again with him, or with Ms. Powers. If Ms. Powers is unable to enter an appearance, and Mr. Labonte wants to proceed in this matter, I will consider appointing counsel to do that so it could be presented. There is of course also the question of whether to wait on the matter of Hunnewell, but I think as Ms. McGaughey has pointed out in light of the new appointment of counsel, there aren't any guarantees as to when that could be decided, so a prompt disposition of the matter in Labonte might well be a vehicle that would get to the circuit sooner that Hunnewell, who knows. That's simply an open question.

MR. NAPOLITANO: Based on the conversations with Mr. Labonte, I'm going file a motion to withdraw, I think Diane will be filing a motion to represent Mr. Labonte.

THE COURT: Well, if you're filing a motion to withdraw, Mr. Napolitano, I want it to be accompanied by a letter to Mr. Labonte telling him that he should either have alternate counsel enter an appearance or to indicate to the court whether he wants the appointment of counsel.

MR. NAPOLITANO: I intend on doing it, Your Honor.

THE COURT: Anything further?

MR. CLIFFORD: Your Honor, if I could, because this is very likely to be appealed.

[41]

THE COURT: Certainly.

MR. CLIFFORD: I would like, if the court is able to now, formal finding of fact if I could with relation to 18, Section 3553, I know the court has reviewed the

sentencing transcript, but I listened carefully just a moment ago, and really, I heard things like nature of the circumstances. I would appreciate it greatly if for the purposes of appeal you could spell out which factors weigh in favor of retroactive application and which factors do not.

THE COURT: Let me think about that for a moment, Mr. Clifford, and the only reason why I'm thinking about it is the precedent that I am setting as to whether indeed a trial Judge has to do that in every case where an amendment may be retroactive.

My initial inclination is for reasons of judicial economy to resist that and to say that that's not required by the case law or the statute for good reason because a court does not at the initial sentencing, and that there has to come a time when we stop spinning out all the reasons and criteria that are listed, but let me also hear from Ms. McGaughey since she will be defending on any appeal as to whether that's something that is probably necessary.

MS. MCGAUGHEY: Your Honor —

THE COURT: Let me make one more comment, I am concerned as a trial judge that there's a tendency of [42] appellate courts to think that trial Judges can always provide all the time necessary to articulate fancy findings to avoid appeal, and I'm concerned not to encourage that more than is appropriate. But let me hear from appellate counsel.

MS. MCGAUGHEY: Let me contrast this to what this court is required to do at the time a sentence is initially imposed by way of highlighting this is a collateral proceeding. In the government's view, the court should not be required to do more on a collateral proceeding that it is required to do at the time a sentence is initially imposed.

When sentence is initially imposed, this court is not required to go through a litany, each of the factors delineated in 3553, the court is not required to give any statement of reasons for the sentence it is about to impose. The court generally does explain to defendants as a matter of beginning the rehabilitation process.

THE COURT: Let me interrupt, I think maybe Mr. Piper's case because of the range of the sentence I may have been required to give an explanation as to where within the range, it was one of those wide range.

MS. MCGAUGHEY: What I mean, Your Honor, you are not required to tick off a checklist even at the time sentence is originally imposed. You are required to explain your thought process to accommodate the range, but there is no litany that was required of you then, I think there should [43] be even less litany that is required of you now. This is a collateral proceeding, this finality has already been achieved, this defendant has taken an appeal of his conviction. Some of the arguments he has made to this court today were resolved by the Court of Appeals against him.

My concern as an attorney who may be in the position of handling these cases is that if the court undertakes the process now, it may start a precedent, and it also may provide fodder for intelligent appellate counsel as we no doubt have to try to compare what is said now with what was said then and create some sort of inconsistency that then requires us to come back and do it a third time.

But my first line is that I don't think anything more than what you have done is necessary, and that is to say that you have reflected on what you did, you

have given thought to whether you should revisit it, and you have decided as a matter of discretion not to revisit it.

THE COURT: Thank you, Ms. McGaughey. Mr. Clifford, I appreciate the inquiry that you've made, but I think that I will stand by my instincts that it's important to differentiate the criteria in this exercise of discretion, I think I have given an adequate reason. If I haven't, you have still another ground for appeal in terms of proceeding, but I appreciate the inquiry. Anything further then, counsel?

[44]

MR. CLIFFORD: No, Your Honor.

THE COURT: Thank you both very much, it was very helpful. The court will stand adjourned.

(At 5:10 p.m., the foregoing proceedings were concluded.)

CERTIFICATE

I hereby certify that the foregoing is a true and correct transcript of my stenographic notes of the proceedings held in the above-entitled matter.

Date this 20th day of March, 1995.

/s/ CINDY PACKARD-ROBITAILLE
CINDY PACKARD-ROBITAILLE
Official Court Reporter

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 95-1538

UNITED STATES OF AMERICA, APPELLANT

v.

GEORGE LABONTE, DEFENDANT, APPELLEE

No. 95-1226

UNITED STATES OF AMERICA, APPELLEE

v.

DAVID E. PIPER, DEFENDANT, APPELLANT

No. 95-1101

UNITED STATES OF AMERICA, APPELLEE

v.

ALFRED LAWRENCE HUNNEWELL, DEFENDANT, APPELLANT

No. 95-1264

STEPHEN DYER, PETITIONER, APPELLANT

v.

UNITED STATES OF AMERICA, RESPONDENT, APPELLEE

Before: TORRUELLA, CHIEF JUDGE, SELYA, CYR, BOUDIN*, STAHL** and LYNCH, CIRCUIT JUDGES.

ORDER OF COURT

Entered: January 24, 1996

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:
WILLIAM H. NG, CLERK

By: /s/ [illegible] O'NEIL
O'NEIL
Chief Deputy Clerk

[cc: Ms. McGaughey, Messrs. Ciraldo, Clifford, Bourbeau & Miller]

Concurrence follows.

Dissents follow.

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* Judge Boudin concurs on the denial of the petition for rehearing en banc.

** Judge Stahl and Judge Lynch dissent on the denial of the petition for rehearing en banc.

BOUDIN, *Circuit Judge.* This is a difficult case with effective arguments on each side but there is no present conflict between the panel majority and any other circuit. Further, nothing that this circuit decides, by panel or en banc decision, will resolve definitively an issue that could affect many cases throughout the United States. The sooner the Supreme Court has an opportunity to consider whether to review this case, the better for all concerned.

STAHL, *Circuit Judge*. I dissent from the denial of en banc review. The issue presented is complex and important. The amendment prescribes a significant reduction in the sentences for defendants deemed by Congress to be most in need of lengthy incarcerations. More importantly, because the amendment applies retroactively, it will undoubtedly burden district courts throughout the country with the task of reviewing on a case by case basis a substantial number of requests for resentencing. Indeed, this is already the case in the First Circuit. Moreover, this burden will arise notwithstanding what, I believe, are substantial and legitimate doubts about the amendment's validity. The question of the amendment's validity is a significant issue that, I am confident, every circuit will eventually need to address. While the issue is exceedingly close, the arguments on either side are sharply drawn and may benefit little from further consideration by our sister circuits. In fact, I think it likely that a conflict in the circuits along the lines dividing the panel in this case will ultimately result. Notably, this issue had been pending in the Seventh Circuit since last spring. Thus, for the reasons stated, I believe it would be advantageous to every circuit if the Supreme Court would review the decision of this court.

LYNCH, *Circuit Judge*. I dissent from denial of the petition for rehearing en banc. The issues raised by these cases as to the validity of Amendment 506 to the Sentencing Guidelines have enormous implications for the administration of criminal justice both in this Circuit and elsewhere. U.S.S.G. App. C, amend. 506 (Nov. 1994) (amending U.S.S.G. § 4B1.1, comment. (n.2)). I agree with both Judge Stahl and Judge Boudin that the earlier there could be a definitive answer on these issues from the Supreme Court the better.

APPENDIX G

1. Section 994(h) of Title 28 of the United States Code provides as follows:

The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and—

(1) has been convicted of a felony that is—

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 *et seq.*).

(2) has previously been convicted of two or more prior felonies, each of which is—

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959, and the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 *et seq.*).

2. Section 4B1.1 (including accompanying Commentary) of the United States Sentencing Guidelines (Nov. 1, 1995) provides as follows:

§ 4B1.1. Career Offender

A defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. If the offense level for a career criminal from the table below is greater than the offense level otherwise applicable, the offense level from the table below shall apply. A career offender's criminal history category in every case shall be Category VI.

Offense Statutory Maximum	Offense Level*
(A) Life	37
(B) 25 years or more	34
(C) 20 years or more, but less than 25 years	32
(D) 15 years or more, but less than 20 years	29
(E) 10 years or more, but less than 15 years	24
(F) 5 years or more, but less than 10 years	17
(G) More than 1 year, but less than 5 years	12

* If an adjustment from § 3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

Commentary

Application Notes:

1. "Crime of violence," "controlled substance offense," and "two prior felony convictions" are defined in § 4B1.2.

2. "Offense Statutory Maximum," for the purposes of this guideline, refers to the maximum term of imprisonment authorized for the offense of conviction that is a crime of violence or controlled substance offense, not including any increase in that maximum term under a sentencing enhancement provision that applies because of the defendant's prior criminal record (such sentencing enhancement provisions are contained, for example, in 21 U.S.C. 841(b)(1)(A), (b)(1)(B), (b)(1)(C), and (b)(1)(D)). For example, where the statutory maximum term of imprisonment under 21 U.S.C. § 841(b)(1)(C) is increased from twenty years to thirty years because the defendant has one or more qualifying prior drug convictions, the "Offense Statutory Maximum" for the purposes of this guideline is twenty years and not thirty years. If more than one count of conviction is of a crime of violence or controlled substance offense, use the maximum authorized term of imprisonment for the count that authorizes the greatest maximum term of imprisonment.

Background: Section 994(h) of Title 28, United States Code, mandates that the Commission assure that certain "career" offenders receive a sentence of imprisonment "at or near the maximum term authorized." Section 4B1.1 implements this directive, with the definition of a career offender tracking in large part the criteria set forth in 28

U.S.C. § 994(h). However, in accord with its general guideline promulgation authority under 28 U.S.C. § 994(a)-(f), and its amendment authority under 28 U.S.C. § 994(o) and (p), the Commission has modified this definition in several respects to focus more precisely on the class of recidivist offenders for whom a lengthy term of imprisonment is appropriate and to avoid "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct . . . ." 28 U.S.C. § 991(b)(1)(B). The Commission's refinement of this definition over time is consistent with Congress's choice of a directive to the Commission rather than a mandatory minimum sentencing statute ("The [Senate Judiciary] the Committee believes that such a directive to the Commission will be more effective; the guidelines development process can assure consistent and rational implementation for the Committee's view that substantial prison terms should be imposed on repeat violent offenders and repeat drug traffickers." S. Rep. No. 225, 98th Cong., 1st Sess. 175 (1983)).

The legislative history of this provision suggests that the phrase "maximum term authorized" should be construed as the maximum term authorized by statute. See S. Rep. No. 225, 98th Cong., 1st Sess. 175 (1983); 128 Cong. Rec. 26,511-12 (1982) (text of "Career Criminals" amendment by Senator Kennedy); id. at 26,515 (brief summary of amendment); id. at 26, 517-18 (statement of Senator Kennedy).